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CASES DECIDED

IN THE

SUPERIOR COURT,

AND THE

Court of Errors and Appeals

OF THE

STATE OF DELAWARE.

REPORTED BY

JOHN W. HOUSTON, ASSOCIATE JUDGE.

EDITED BY

ROBERT G. HOUSTON, OF THE SUSSEX COUNTY BAR,

—AND—

ROBERT H. VAN DYKE, OF THE KENT COUNTY BAR,

Under Authority of the General Assembly.

VOL. VII.

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The following Judges composed the Courts from the Spring of 1884, till the June Term of the Court of Errors and Appeals, 1887, the period embraced in this Volume of Reports:

HON. WILLARD SAULSBURY, Chancellor.

HON. JOSEPH P. COMEGYS, Chief Justice.

HON. JOHN W. HOUSTON, Associate Justice.

HON. WILLIAM G. WHITELEY, Associate Justice, died April 23, 1886.

HON. IGNATIUS C. GRUBB, Associate Justice, appointed May 25, 1886.

HON. EDWARD WOOTTEN, Associate Justice, died March 1, 1887.

HON. JOHN H. PAYNTER, Associate Justice, appointed March 25, 1887.

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SUPERIOR COURT,

SPRING SESSIONS,

1884.

Lessee of JAMES H. WINDSOR *v.* JOHN S. BACON, tenant in possession.

Title to land—Ejectment.

The vendor in a written contract for the sale of land may bid at the Sheriff's sale of the vendee's equity therein without being thereby estopped from claiming title thereto.

An equitable title to land will not maintain an action of ejectment.

(*Sussex, April 17, 1884.*)

ACTION OF EJECTMENT for an undivided moiety of about thirty two acres of land near Laurel.

The lessee of the plaintiff claimed title by and through a deed from William H. Anderson and wife to William J. Windsor and John S. Bacon, and the sale of said lands, September 2, A. D., 1876, being tract No. 5 of the lands of the said William J. Windsor. to James H. Windsor, the plaintiff, by Eli R. Sharp, late sheriff, under an execution issued on judgment No. 167, October Term, 1865, of James Ponder, for the use of William E. Wolfe, now for the use of John E. Parker vs. William E. Wolfe and William J. Windsor, and a deed for the same from the said sheriff, dated November 13, A. D., 1876.

The evidence on the part of plaintiff was that in 1867 the original owner, William H. Anderson, told one James H. Tyre that he had sold a piece of land to William J. Windsor and John S. Bacon, and employed him to survey it, and to draw up a convey-

ance bond from him to them, for the conveyance of said land, on the payment of the price, fifteen hundred and thirty three dollars and fifty-six cents. The purchase by Windsor and Bacon, and the lease of a portion of the land by them to one Thomas Hearn was proven by William J. Windsor. It was also proven by the plaintiff that William H. Anderson was present at the sale of the lands by the sheriff, and bid for them.

Other witnesses were also called and examined by the counsel for the plaintiff, but their testimony was cumulative merely, and added nothing material to the preceding evidence in his behalf. The record containing the judgment and the execution issued thereon, and the sale and deed thereof by the sheriff to him, was put in evidence by the counsel for the plaintiff.

The defendant claimed title by a deed from William H. Anderson and wife to him the said John S. Bacon, dated the twenty-fifth day of September, A. D. 1877, and recorded in Libro B. P. No. 89, folio 521, in Recorder's office in and for Sussex County.

Jacob Moore, for the plaintiff: This is not a question of legal but possessory title. If there was a contract of purchase and the purchaser was put in possession of the land, and there was no deed from the vendor, the plaintiff is entitled to recover. But this is an estoppel in pais, the vendor having bid for the premises at the Sheriff's sale was estopped by it, and if he was estopped then the defendant, John S. Bacon, is estopped from claiming under the deed afterwards made and delivered to him for the whole of the land by William H. Anderson.

A. P. Robinson, for the Defendant, quoted the opinion of Harrington, J., in the case of Hallets lessee vs. Pope and Quills, 3 Harr., 546, and cited 33 Mass., 460.

The Court, Comegys, C. J., charged the jury, that if they should be satisfied from the evidence that William H. Anderson who had sold the land in question to William J. Windsor and John S. Bacon, and delivered the possession to them as joint purchasers, had made and delivered a deed to them, then the plaintiff was entitled to recover, but if they should not be so satisfied then the purchasers had but an equitable title to the premises which would not

be sufficient to maintain the action, and the plaintiff would not be entitled to recover. Anderson, the vender, had a right to bid for the premises at the Sheriff's sale if William J. Windsor had but an equitable and not a legal title to the undivided moiety of them without being estopped by so doing.

Verdict for the plaintiff.

LITTLETON H. DUKES for use of CHARLES M. DUKES *v.* SARGENT COLLINS and ALBERT COLLINS, lately trading as SARGENT COLLINS & BRO.

Statute of Limitations—Absent Debtor's Return into State-Plaintiff's Diligence.

The plea of the statute of limitations is a bar to the action, upon proof of the elapsed time, unless the plaintiff replies specially that before the cause of action accrued, or that after the cause of action accrued, and within three years thereafter, the defendant left the State and never afterwards, up till the time of bringing the suit, returned into the State so that by reasonable diligence he could be served with process.

Reasonable diligence in the case of a debtor absent from the State, requires a plaintiff, at least, to take some steps from time to time to ascertain whether his debtor can be reached with process. Where a debtor, or one of them, if there be more than one, resides in the State at the time the cause of action accrues, and afterwards removes therefrom, the plaintiff need not keep a suit pending against him. But where he, or one of them, if there be more than one, has afterwards come into the State in such manner that, by reasonable diligence, he may be served with process, the act commences to run again from the time of such return and never stops afterwards.

(*Kent, April, 1884.*)

FOREIGN ATTACHMENT.

Defendants appeared and dissolved attachment by giving bail. Plaintiffs testified that Littleton H. Dukes lived at Dagsboro, Sussex County, in 1867–1868. The defendants were then running a saw mill there and boarded with Dukes for nine months at $10.00 per month each. The son of Dukes worked for defendants one month at 75 cents per day, for which he was paid. Defendants

left Sussex County in June, 1868, and went to Pennsylvania. Dukes never knew them to be in Delaware till he saw them at the trial of this case. The goods defendants left in Sussex County were sold by sheriff.

In 1873 they came to Dagsboro to see about paying their debts but left the same day and returned to Pennsylvania.

Defendants moved for non-suit as the claim proved was for board which could not be a partnership debt.

THE COURT granted the motion, but afterwards reconsidered it and allowed the case to go to the jury.

Defendants testified that they boarded with Dukes from April 6, 1867, till July 17, 1867. After this they boarded themselves till they left Sussex County the last of May, 1868. Albert Collins, one of the defendants, went to Frederica and remained two weeks, after which he went to Philadelphia. On Oct. 9, 1878, he moved back to Kent County, in this State, where he lived till the time of trial. Testified that plaintiff's bill for board was more than paid.

Sargent Collins was occasionally in Sussex County till the fall of 1869, when he moved to Philadelphia, but moved to Frederica in this county in Sept., 1871, and lived there till Oct. 25, 1874, when he moved from the State. From Oct. 25, 1867, till 1875, he considered his home to be at his fathers in Frederica.

J. Alexander Fulton, for plaintiffs:

When a debtor absconds or leaves at the time a cause of action accrues, or was absent when it did accrue, so that he cannot or could not be served with process, the statute of limitations does not run during his absence from the State; nor, in a case like this, until he has come back and remained three years in the State, in such manner that by reasonable diligence he might be served with process.

And where he has had a home and place of business in one county, or section of the State, coming back either to do business or reside in another country or section, remote from his former home or place of business, is not a coming back in such a manner, that, by reasonable diligence, he might be served with process; and the statute of limitations is no bar to plaintiff's action in such a case.

And where there are two joint debtors, both must come back and remain in such manner that by reasonable diligence both may be served with process, or the statute will not bar the plaintiff's action.

Revised Code, Chap. 123, Sec. 14, page 730; *Wells & Sappington v. Shreve's Adm'r.*, 2 Houston, 329; *Sherman v. Sutton*, 5 Mason, 143; *Commissioners v. Northern R. R.*, 4 Law R. Ch. D., 843; *Murphy v. Guitenez*, 17 La. An., 269; *Bennet v. Devlin*, 17 B. Mon., 353; *Bogert v. Vermilya*, 10 N. Y., 447; *Denny v. Smith*, 18 N. Y., 567; *Hill v. Bellows*, 15 Vt., 727; *Hackett v. Kendall*, 23 Vt, 275; *Mayberry v. Bainton*, 2 Har., 24; *Geylin v. Villeroi*, 2 Hous., 204.

That as regards any counter-claim or set off the defendants may allege, it cannot be allowed in this action for the reason that the plaintiff has always resided in this State and might have been served with process at any time, so that the replication of the statute is a complete bar to any such counter-claim or set off.

Hurlock v. Murphy, 2 Hous. 550.

James Pennewill and *James L. Walcott*, for defendants.

COMEGYS, C. J., charging the jury:

There are two questions for the jury, the first of which is, did the defendants, as alleged by them upon oath, settle with the plaintiff in April, 1868, and show him that he was indebted to them, in which exhibit he acquiesced. If you believe their testimony, they are entitled to your verdict. If on the contrary you do not credit it, but give your confidence to that of the plaintiff and believe that, as sworn to by him, there never was any such settlement, and also believe that his claim of indebtedness by them to him is sustained, then the plaintiff is entitled to recover the amount of his claim, unless he has allowed the statute of limitations to bar it.

This claim is quite sixteen years old. It is what is called a simple contract debt; as to which the statute provides that suit shall be brought for recovery thereof within three years from the time the right to sue accrues, or not at all. I speak of the effect of the act. In this case as appears by the plaintiff's testimony, the

board, etc., which is the subject of the claim, was furnished during part of the years 1867 and 1868, the time ending in April of the latter year. The cause of action, or, which is the same thing, the right to sue the defendants, accrued to the plaintiff at that time, there not appearing any agreement for credit, and there being no usage for such, as far as we are aware, in like cases. Regularly, therefore, a suit to recover this claim, was barred by the statute on the first of May, 1871.

The defendants have pleaded the act of limitations, and if issue had been taken upon such plea, the statute would have been a flat bar to this action; but the plaintiff has replied two allegations to the plea; the first of which is in effect that before the cause of action accrued, the defendants left the State and never afterwards, up to the time of bringing the suit, returned into the the State so that by reasonable diligence they could be served with process; the other is, that after the cause accrued, and within three years thereafter, the defendants left the State, and up to the time of bringing this action had not returned, in manner aforesaid. Issue is taken upon these replications, according to the statement upon the record, and upon them the question is—did the plaintiff in this case use reasonable diligence in endeavoring to ascertain whether the defendants had come within the reach of legal process. We say to you that reasonable diligence, in cases of absent debtors, requires that the plaintiff shall, at least, take some steps from time to time to ascertain whether his debtors can be reached by suit or not. Where a cause of action accrues whilst a defendant is a non-resident, the law would not require of the plaintiff the same degree of diligence as in a case where the defendant was a resident when it accrued and went out afterwards, but before the time for bringing suit had expired. In such case it is not unreasonable to require a greater degree of diligence. In the first case, as the plaintiff is not bound to keep a writ running against his debtor, there would be no hardship in requiring that the debtor should appear in the neighborhood of his creditor so that his presence might be known. But the case is very different where the debtor resided in the State whilst the cause of action was accruing, or after it had accrued. In such case, in order that the statute may be complied with, it is necessary that something, at least, like active diligence, should be

done by the creditor to prevent the act from running. He is not, in such case, to fold his arms and await the coming of his debtor in his immediate neighborhood; but should be prepared to show that he has, at least, made, at different intervals or periods, inquiry as to the whereabouts of his debtors. He is not required to keep a suit pending against them; but where they have come into the State openly and notoriously so as to be visible to all that chose to seek after them—resorting to no concealment or other step to prevent their creditor knowing of their presence, and so remained long enough for him, if he had used ordinary means to inform himself of the fact, to find out that they or one of them was present in the State, and also to consult counsel and sue out process which might, by reason of their continued presence, have been served by the sheriff, the act commences to run again from the time of such return and reasonable opportunity for service of process, and never stops afterwards. This suit was brought on the 9th day of February, 1882. If you find that more than three years before that time, these defendants, or either of them, was in this State in such manner of openness, notoriousness before all the people where they were, as that the plaintiff might, if he had been looking after them and his claim as ordinary creditors would, have caused process to have been served upon them, then he was bound to have it issued and served; and not having done so, he is now barred. The defendants in this case went to Sussex from Frederica in this county, and that fact was known. You have testimony before you that they returned to Frederica after they left Sussex, and that they or one of them was there most of the time from 1871 to 1874, being sometimes temporarily absent in Philadelphia. It is also in proof that in 1878, in October, Albert Collins came to reside at Woodside in this county and engaged in business, and that he resided there or at Canterbury Station, two or three miles off, up to the time of the suit and now resides there. Whether this testimony is to be credited by you, and there is nothing to gainsay it, it is for you to say. If you take it to be correct, then to hold that due diligence was used by the plaintiff according to the requirement of the statute, would be virtually to repeal it.

Verdict for the defendants.

James K. Miller *v.* Thomas T. Lacey.

Sale of Personal Property—Fraud Upon Creditors.

To make a sale of personal property valid there must be a valuable consideration paid, or secured to be paid, and an actual delivery into the hands of the purchaser as soon as conveniently may be after the sale is made. Where actual delivery is prevented on account of bulkiness, or other like cause, the property should be placed at once, or with all convenient promptness, within the exclusive power and control of the purchaser.

Although all the requisites of a valid sale be present, yet, if the object of the sale be to delay or defeat creditors or hinder them in the use of the ordinary means for the collection of their debts, it will be void.

To make such a sale invalid it must appear to the jury that the purchaser knew, either directly or circumstantially, that the object of the sale was to prejudice the rights of creditors. And a subsequent purchaser, without the knowledge of the intended fraud, could take no better title than the person from whom he purchased.

In the case of a sale of a stock of goods in a store it is not necessary that all the different articles should be handed over to the buyer by actually placing them in his hands, but delivery may be made symbolically, as by giving him the key of the house or room in which they are stored; and then the control over them by the party selling must utterly cease, and thereafter remain exclusively in the purchaser.

(*Kent, May 5, 1884.*)

Replevin.

Charles H. Benn, of the town of Dover, being the owner of store goods of the value of $200, sold the same to Mrs. Grover Smith, his sister, and George Benn, his brother, the consideration being the payment of his note for $75.00, upon which they were endorsers The following day the defendant, with an execution upon a judgment at the suit of Louis Bremer's Sons against Charles H. Benn, levied upon the said goods as the property of Charles H. Benn. The plaintiff afterwards purchased the said goods from Mrs. Grover Smith and George Benn, and bring this action of replevin.

James Pennewill, C. H. B. Day and *James L. Wolcott*, for plaintiff:

J. Alexander Fulton, for defendant:

In every sale of personal property, as against the creditors of

the seller, there must be actual delivery to the buyer, and the possession must be immediately taken and retained by him; and even if possession be given, if the goods come back and remain in the possession or control of the seller, the sale is void. The change of possession must be complete, apparent, continuous and exclusive. It must be such as to give notice to all the world of the new ownership.

R. C., 356 §4; 55 Cal., 254; 32 La. An., 1132; 13 La. An., 595; 19 Cal., 320; 2 W. & S., 147; 6 W. & S., 94; 48 Pa., 413; 27 Wis., 246.

The selling out of a store by wholesale or in a lump, without inventory or appraisement, is contrary to the usual course of business; and when done by one in failing or embarrassed circumstances, is a badge of fraud in itself.

If the sale, or pretended sale, of this store was made by Charles H. Benn to his brother and sister with the purpose or design of hindering, delaying or defrauding his creditors, it was fraudulent and void, and the goods were liable to be seized and sold upon the execution in the hands of the sheriff against Charles H. Benn. And as Miller, the plaintiff in this suit, claims through them, he is in no better position than they would be, and he cannot recover.

Even if Miller after he got possession under this fraudulent sale, if the jury find it was fraudulent, purchased other goods with his own money, and put them in with goods levied on by the sheriff, he cannot recover for them without pointing out to the sheriff *specifically* which they were, and demanding them of the sheriff before suit brought; and, as he did not do this, he cannot recover.

2 Hous., 189, &c.; 5 N. H., 364.

If after the levy by the sheriff, September 1, 1881, Charles H. Benn or any one coming in under him, sold part of the goods levied on and substituted others, the substituted ones were lawfully sold by the sheriff on the execution.

2 John Ch., 62; Herm. Ex., 277; 29 N. Y., 471.

COMEGYS, C. J., charging the jury:

In order to make a valid and perfect sale of property, there

must be delivery of it at the time of the transaction, or as soon thereafter as the circumstances existing will permit. This is the general law with respect to the subject, recognized and acted upon by the courts throughout the country. In order to fully inform the public mind about the requisites of a valid sale, the Legislature of this State re-enacted the principal features of the English statutes of frauds and perjuries and laid down the law of sales by the 4th section of such re-enactment in the following words:

"No sale, whether with or without bill of sale, of any goods or chattels, within this State, shall be good in law, (except as against the vendor) or shall change, or alter, the property in such goods or chattels, unless a valuable consideration for the same shall be paid, or in good faith secured to be paid, and unless the goods and chattles sold shall be actually delivered into the possession of the vendee as soon as conveniently may be after the making of such sale.

"And if such goods and chattels, so sold, shall afterward come into and continue in the possession of the vendor, the same shall be liable to the demands of all his creditors."

To make a sale valid, therefore, in this State, so as to change the property in the articles and vest it in the buyer, there must be an actual delivery into the hands of the purchaser as soon as conveniently may be after the sale is made. Where articles are capable of delivery by hand, and are present at the time of the sale, they should be at once handed over to the buyer. Where they are not present, they should be delivered without any delay except such as their absence necessarily occasions. Where they are not capable of actual delivery, on account of their bulkiness, or other like cause, they should be placed at once, or with all convenient promptness, within the exclusive power and control of the purchaser, as by the delivery to him of the means by which he may possess himself of them—an assignment of the bill of lading where goods have been shipped, the key of the warehouse where the goods are stored therein, the necessary papers indicating ownership under the law of ships or vessels, and the like.

The object of this enactment is the defeating dishonest sales—that is, pretended sales, where no property was meant to pass to the apparent buyer.

Sales of personal property made *bona fide* and in compliance with our statute, are perfectly valid, though no writings whatever pass between the parties. Necessity for writings in the case of such property does not exist, as in the case of land. The latter being incapable of delivery from hand to hand, it was necessary that some permanent evidence should exist that the ownership was in a particular person. And this the more, because one man may be the owner *bona fide* of it, and another person may be the visible owner having the actual possession. But because of the requirement of writings his visible ownership clothes him with no authority to deal with the title to the land, he not possessing the evidence of that. The case is different with respect to movable property: possession of it is evidence *prima facie* of full ownership. If the real owner of such allow another to have possession of it, and to act and deal with it as his own, he would be denied relief in a court of justice against the act of his depositary in disposing of it as his own property, on the ground that to give it to him would be to operate a fraud upon the innocent buyer.

In the case of a sale of a stock of goods in a store, it is not necessary that all the different articles should be handed over to the buyer by actually placing them in his hand; but it is necessary that they shall be at once (if they are present), or as soon as convenient (if they are absent), delivered over to him. This may be done symbolically—that is by giving him the key of the house or room in which they are kept, or stored. And then, that the transaction may be free from all suspicion, or defect, the control over them by the party selling must utterly cease and be at an end. In order to place this beyond any boubt, you will observe the provision of the statute—that if the property sold shall afterwards come to and continue in the possession of the seller, it should be liable to the demands of all his creditors. The object was to defeat a fraud, then common and by no means unusual now, of going through the ordinary forms of sale, by payment of purchase money and delivery of goods, or a bill of them, and then taking them back again and using them as before. Of course the fraud of this step existed as well before as after the statute, but there was no definite rule for defeating it. Now, a party claiming goods formerly belonging to another, and claimed by that other's creditors to

still belong to him, must be prepared to show that he gave a valuable consideration, or price, for them either in money or other valuable thing, or secured the same to be paid, and also that possession of the goods was delivered to him as required by the statute, and that he has retained the exclusive control over them since the sale.

This is further law upon the subject of sales. It is not in the form of an act upon our statute book, but is a part of the statute law of the mother country which our forefathers when they came to America as colonists, brought with them, along with what we call the common law, as being suited to their circumstances and condition. It is, that although all the requisites of a valid sale should concur—valuable consideration, and actual delivery without any control or power of it on the part of the seller; yet if the object of the sale is to delay, or defeat creditors, or hinder them in the use of the ordinary means for the collection of their debts, such a sale shall be void. It is in fact as much so as if no delivery of the property at all had taken place. This is on the ground of the intended fraud on creditors; for fraud will vitiate and avoid all transactions, however honest and straightforward apparently. But to make such a sale invalid as against the buyer, it must appear to the jury trying such a question either that he knew that the object of making the sale was to prejudice the rights of creditors, or that circumstances existed of which he could not reasonably be ignorant, which indicated the real dishonest object of the seller. If the jury should find in such case of intended fraud on the part of the seller, either that the buyer had actual knowledge of it, or that the circumstances were such as would fix him with such knowledge, then it will not avail him that he gave the full value of the property, much less if he bought it at a reduced price. The law is very tender and considerate of the rights of creditors, and abhors fraud in every form how speciously honest soever a transaction may be; and will expose, subvert and sweep away all the devices which the ingenuity of rogues and cunning persons can contrive to carry into effect or conceal a fraud, if proof of the unlawful object can be made. It therefore makes no difference, where fraud upon creditors is the object, and is, or should be so understood by the buyer, that the goods he bought were at once

delivered to him as his property and placed under his exclusive control, and that he actually paid their full value for them. The law punishes him by subjecting the property he bought to the claims of the seller's creditors, for his lending himself to the dishonest contrivance of the debtor, his vendor.

This is the law, gentleman of the jury, of this State, and elsewhere in this country. It promotes honesty and fair dealing in the transactions of men in buying and selling, and defeats, when its operation is invoked by him who has been wronged, all the schemes, covers, tricks, contrivances and simulations, however artfully conceived and executed, and with whatever form and ceremony sought to be carried into effect, to cheat and defraud.

Charles H. Benn was in failing circumstances, as he said himself in his testimony on the witness stand, and being possessed of a stock of goods in a store worth, according to the evidence, $200, and his brother, George Benn and sister, Mrs. Grover Smith, being his endorsers on a note in bank for $75, he sold the stock of goods to them the day before the execution was issued. If that sale was fraudulent and void, then Miller, the plaintiff, could not have taken a valid title to them on his purchase of the goods from them afterwards, although he had no knowledge of the fraud when he bought them.

Verdict for defendant.

JAMES TRIMBLE & CO. *v.* HURST, MILLER & CO.

Execution liens—Application of proceeds of Sheriff's sale.

The proceeds of a private sale of a portion of his personal property by the defendant in executions, under an agreement with his execution creditors that the proceeds be applied to the executions according to priority, must be applied by the first lien creditor to his execution debt and not to an unsued note; and a creditor, whose claim was not in execution at the time of the private sale, but being in execution at the time of the Sheriff's sale, might insist upon this application and thereby become entitled to the proceeds of the Sheriff's sale of the balance f defendant's goods.

(*Kent, May 8, 1884.*)

PETITION for application of proceeds of sheriff's sale.

The contention in this case arose under the following circumstances:

The personal property of Nehemiah Jacobs was sold by the Sheriff of Kent County on the twenty-fourth day of March, 1884. After paying undisputed claims, there remained in the Sheriff's hands $338.90. Of this sum Wm. H. Vaughn claimed $152.03; Hurst Miller & Co., $181.08, with interest from January 17, 1884, and costs; and James Trimble & Co., $198.00, with interest from February 15, 1884, and costs.

Under the provisions of the 3d Section of Chapter 32 of the Revised Statutes, page 164, the Sheriff asked and obtained leave to pay the money into Court. As soon as this was done, James Trimble & Co. presented their petition to take it out; upon which a rule was laid upon Hurst, Miller & Co. to show cause why the prayer of the petition should not be granted.

The evidence was substantially as follows:

On the twenty-fourth day of March, 1884, when the Sheriff's sale took place, he had in hand these executions against Jacobs:

Thomas C. Else & Co.,	received	February	8,	1884.
E. Levering & Co.,	"	"	9,	"
C. H. Dillinger & Co.,	"	"	9,	"
W. H. Vaughn,	"	"	12,	"
James Trimble & Co.,	"	"	16,	"

But *prior* to all of these, to wit, on the seventeenth of January, 1884, Hurst, Miller & Co. placed two executions in the hands of a constable against the said Jacobs; and it was conceded that if

the plaintiffs in these had done nothing to waive or forfeit their lien they would be entitled to take the money out of court, and that the rule should be discharged. To prove that they had done this, the Petitioner called the defendant, Nehemiah Jacobs, as a witness, who said in substance, that being anxious to sell a part of his property at private sale, to take place February 14, 1884, he obtained the consent of all the creditors who had executions at that time that he might do so, provided he would apply the proceeds to the executions in the order of their priority; that Squire Golt, who was the agent of Hurst, Miller & Co., had assented to this with the others; that Golt attended with the constable the day of his vendue and made no objection; that the proceeds of the private sale amounted to nearly $200 which was nearly the same amount as the two executions of Hurst, Miller & Co.; that the same was made on time, and judgment notes were taken from the purchasers and transferred to Squire Golt, as the agent of Hurst, Miller & Co. That he meant and understood that these vendue notes were on account of the executions then in the constable's hands against him. That he really did not then know or remember that 'Squire Golt had other notes of his due Hurst, Miller & Co. Also that he paid 'Squire Golt the costs in cash.

Nathaniel H. Griffith, the constable, was called by the plaintiffs in the Rule, and proved that he received the executions of Hurst, Miller & Co. from 'Squire Golt; that he made a levy; that when he saw Jacob's advertisements up, he called on Golt to know what he should do. That Golt told him to meet him at Jacob's the day of the sale; that he did so; that Golt told him not to interfere, as he had *other claims* a good deal larger in amount than the executions, and wanted Jacobs to sell enough to pay all the claims in his hands; and that he, Jacobs, had promised to do so. That in consequence of this instruction he did not interfere with the sale. He also said that 'Squire Golt afterwards instructed him to claim the amount of these executions out of the fund in the sheriff's hands, which he had done, but was refused. He said further that Golt had paid him his costs on the executions.

John S. Herrington, sheriff, proved the agreement of the execution creditors to let Jacobs sell at private sale, provided the proceeds were applied to the executions in order of priority.

The defendant in the rule, Hurst, Miller & Co., called E. J. Golt, Esquire, who said he was a Justice of the Peace and Notary Public, and a Collecting Agent. That he had four notes given by Jacobs to Hurst, Miller & Co. That he obtained judgment on two of them, and issued executions to Griffith. That Jacobs informed him that he was going to make a vendue, and wanted his consent, so that there would be no interference; that he assented so far to his going on, that he said he, Golt, would go down to the sale; that he did so, and did not object to the sale, but refrained from doing so, because he expected all the claims in his hands to be paid out of the proceeds; that he meant the unsued notes; that he regarded these only as in his hands, and the executions as in the hands of the constable; that after the sale Jacobs brought him the notes and he applied them to the unsued notes, and did this with Jacobs' assent. He also exhibited a paper showing the application, but admitted on cross examination that this paper was written after Jacobs left. He also said he had given Jacobs a receipt, stating that the notes were to be applied to claims in his hands. The receipt was afterwards produced and was as follows:

Received March 7, 1884, of Nehemiah Jacobs, one judgment note of Peter and D. T. Loose for $49.26, one note of Samuel Porter's for $80.00, one note of Eugene Coppage and W. B. Hazell for $28.48, and one note of Herbert Hennford's for $37.00, which when paid, is to be applied to claims of Hurst, Miller & Co., in my hands for collection.

E. J. GOLT.

$ 49.26
80.00
28.48
37.00

$194.74

J. Alexander Fulton, for the Petitioners, contended:

1. That there was actual payment of the two executions of Hurst, Miller & Co. by the acceptance of the vendue notes.

2. That the conduct of Golt as the agent of Hurst, Miller & Co. was fraudulent in fact and in law, and by it they lost the undoubted priority.

Kimball v. Mungee, 2 Hill, 364; *Kellogg v. Griffin*, 17 John, 274; *Storm v. Wood*, 11 John, 110; *Freeburger's Appeal*, 40 Pa., 244; *Commonwealth v. Stembach*, 3 Rawle, 341; *Eberle v. Mayer*, 1 Rawle, 366.

3. That if there was any doubt in the evidence as to the application of the vendue notes, it should be resolved in favor of Trimble & Co., *First*, because Jacobs swears positively that he intended the notes to go to the executions, and he had an undoubted right at that time to direct and control the application. *Second*, because the statement of the application in the receipt given by Golt is equivocal in its terms. That *claims* may as well embrace executions as unsued notes; and, at any rate, where an instrument is capable of two constructions, the one favorable to the maker, and the other to the recipient, the one most favorable to the latter shall prevail.

N. B. Smithers, for Hurst, Miller & Co., contended:

On the question of fact, the evidence showed that the application was not to the executions in the hands of the constable, but to the unsued notes in the hands of 'Squire Golt. That Golt swore positively that such was the fact, and the receipt bore him out; because by its terms it was on account of *claims* in his hands for collection, while the executions were not in *his* hands, but in those of the constable.

That the transactions between Golt and the constable and Jacobs were neither legal nor actual fraud, and did not postpone the executions. That *at that time* Trimble & Co. had no executions against Jacobs, and he had a perfect right to dispose of his property as he pleased, so far as they were concerned. That a plaintiff in an execution may give any indulgence he please without losing his lien or priorty.

Janvier v. Sutton, 3 Har., 37.

Fulton, in reply, said that the word "claims" embraced both the executions and the notes unsued, and was as applicable to the one as to the other. That the contention that the vendue notes were to be applied to the executions was the more reasonable from

all the circumstances; and especially so as Jacobs had no occasion to ask leave to make a vendue as to claims not then sued.

That while it was true Trimble & Co. had no lien at the time of the private sale, yet the fund in court did not arise from the proceeds of that sale, but of the subsequent sale by the Sheriff when they had their executions in his hands; and that the court was sitting here as a Court of Equity, and if Hurst, Miller & Co. had done anything that prejudiced Trimble & Co.'s rights they ought to be and would be postponed.

He did not question the authority of *Janvier vs. Sutton*, but contended that that was a very different case on the facts. That there was simply *indulgence;* in this case there was positive aid by which the property passed out of defendants' hands, thus leaving him so much less able to pay his debts.

The Court held that the executions of Hurst, Miller & Co. were not entitled to the balance of the fund in question.

Peter Warner v. Jacob F. Chamberlain.

Bite of Dog—Damages.

The owner of a dog, it being a domesticated animal, is liable for any injury it may do to another only in case he knows it is accustomed to bite or has a ferocious, savage disposition, or propensity to bite. Proof of such knowledge on the part of defendant is sufficient to enable plaintiff to recover for personal injury thereby sustained; and the fact that the dog is commonly kept confined by the owner is evidence of such knowledge.

Verdict for plaintiff should include such damages as necessarily arose from the injury sustained, as nursing, medical attendance, pain, fear and apprehension of hydrophobia, and loss from having been disabled from pursuing his usual business.

(*New Castle, May 26, 1884.*)

Action on the case for injuries to plaintiff by the biting of a dog belonging to defendant.

On July 14, 1883, plaintiff went to the house of defendant to buy milk, as he was wont to do, and was coming away when the dog attacked him and bit him in the calf of his leg. The bite was

a very severe one, as was testified to by plaintiff and other witnesses. Plaintiff testified that defendant on seeing the wound had said he would not have taken that bite for a thousand dollars. One witness testified that several years prior to this he was attacked by the same dog and had shot him in the head, but the dog recovered. Other witnesses testified to the bad character of the dog, it having attacked other persons, and that they were in the habit of carrying weapons of different kinds with which to protect themselves from harm by him.

Defendant testified that he never knew the dog to bite any one, and children and others used to go through his yard without molestation, and he had endeavored in vain to hiss him on base ball players who trespassed on his property. He went to see Warner the Sunday after the alleged biting and saw the wound, which was a mere scratch. He offered to send for Dr. Shortlidge to attend him, but Warner did not want him. The witness denied having said that the dog had previously bitten an Irishman, and that he would not have been so bitten for $1,000. He gave the dog away after Warner complained, and it was the first complaint, and the dog is now dead. At the time Orr shot his dog he was only a pup. Other witnesses testified that they were near neighbors to the defendant and were well acquainted with the dog and never knew him to bite anyone or to be of an offensive character. One witness, who saw the wound immediately after the biting, said it was a mere scratch on the outer skin which might have been caused by a claw.

The plaintiff being recalled, testified that defendant had never offered him any assistance or offered to send him a physician; and he had his leg cauterized because he was afraid of hydrophobia.

The wounded leg with its scar was offered in evidence but was ruled out.

H. H. Ward, for plaintiff:

An actual biting not necessary to prove. A savage disposition evinced by attempting to bite sufficient. *Worth v. Gilling,* 2 L. R. C. P., 1; *Godean v. Blood,* 35 A. M. Rep., 751.

Liability of owner of vicious dog after notice, irrespective of

negligence on the part of the plaintiff or defendant. *Woolf v. Chalker*, 31 Conn., 121, page 130; *May v. Burdett*, 9 Queen's Bench, 101, etc.; *Muller v. McKesson*, 73 N. Y., 195, pages 199 to 202.

One previous bite or vicious act sufficient. *Arnold v. Norton*, 25 Conn., 92, page 95; *Kittredge v. Elliott*, 16 N. H., 77.

Reasonable expenses for medical care, although not actually paid, may be included in the jury's estimate of damages. *Gries v. Peck*, 24 Ohio, 329.

The fact that the injury complained of is the first actually inflicted by the dog, does not excuse the owner when the plaintiff is innocently upon the defendant's premises, and the dog is known to be vicious by defendant. *Rider v. White*, 65 N. Y., 54, pages 55 and 56.

Proof that the dog was ferocious was equivalent to express notice to the owners of its propensity. *Muller v. McKesson, et al.*, 73 N. Y., 195, 199.

Evidence that the dog was usually inoffensive inadmissible in a proper case for recovery. *Buckley v. Leonard*, 4 Denio N. Y., 500.

Fear and solicitude as to the poison and all pain, anguish, and solicitude occasioned by the bite are proper elements of damages. *Godean v. Blood*, 36 A. M. Rep., 751.

Harry Emmons, for defendant:

If plaintiff is entitled to recover at all, he is only entitled to such damages as he has actually received according to the evidence.

That the jury must be satisfied from the evidence that the dog which made the attack on the plaintiff was the dog kept by the defendant.

That the jury must be satisfied from the evidence that the defendant knew the dog to be a vicious animal and accustomed to attack and bite mankind, and that he kept the animal after knowledge of its mischievous propensities. *Wharton on Negligence*, 766 § 913; *Vrooman v. Sawyer*, 13 Johnson, 339; 2 Salkelds, 662; 4 Carr. & Payne, 297; 4 Denio, 501.

COMEGYS, C. J., charging the jury:

That while in the case of untamed animals, a person keeping

them is liable for any injury they may do to others; yet, where animals have been domesticated, for example dogs, the owner of them is only liable in case he knows they are accustomed to bite or have a ferocious, savage disposition, or spirit, which domestication has not subdued.

It is not necessary, in order to entitle a plaintiff to recover for the bite of a dog, that he should prove that another person has been bitten, but it is sufficient if he show by proof that the owner knows him to have a wicked, ferocious spirit, such as renders it dangerous that he should be at large. The fact that he is commonly kept confined by the owner, is evidence from which the jury may infer such knowledge on the part of the owner.

In all cases, before a plaintiff can recover for injury by a dog from having been bitten, it must be proved to the satisfaction of the jury that the defendant kept the dog, and that he did so knowing he would bite, or was of such a ferocious nature that he had a propensity, or was likely to do so. Such knowledge may be shown as well by circumstances, as by positive proof.

The plaintiff was rightfully on the defendant's premises upon his usual errand for milk, and was, in no sense, wrongfully there.

If the jury should find for the plaintiff, he is entitled to such damages as necessarily arose from such an injury as he sustained, including nursing, medical attendance, pain, suffering in body and fear and apprehension of hydrophobia, if such be shown to have been incurred, or felt; and also any loss he sustained from having been disabled from pursuing his usual business.

Verdict for plaintiff for $36.00.

Charles Green v. John Maloney.

Written contract—Proof of Execution—Fraud.

Weight of testimony does not necessarily lie with the side which produces the most witnesses to prove a fact, but rather with that where the facts sworn to are most consistent with the probability of truth.

A written instrument must be duly proven to have been executed by the person sought to be charged with it. This may be done by the subscribing witness proving his own handwriting only. Such proof is *prima facie* evidence of its due execution, and thereafter the burden of disproving the same is upon the defendant.

In order to bind an illiterate man by a written instrument, it must have been honestly and fairly read or explained to him, and be of such a nature that such a man could understand what it means. It need not be shown that he did understand it.

A person having signed a paper which was read to him is presumed to have understood it, and he may not aver against it unless he can show that it was falsely and fraudulently obtained.

(*New Castle, May, 1884.*)

Issue to ascertain whether or not a bond and warrant of attorney dated January 1, 1873, was an act of the defendant, executed with his knowledge, whether he was induced to sign it by fraudulent representations, whether it was fraudulently procured, and whether it was executed on the date it bears. Judgment had been entered thereon, May 2, 1881, for $621. It was admitted that the bond was not executed until April, 1881. It was stated that Maloney had been for many years a customer of Green, who kept a store at Rockland, and was largely indebted to him, and that finally Maloney was refused further credit and the bond and warrant of attorney was executed to Green. Edward P. Conner, one of the witnesses to the bond, identified the bond and his signature, but he did not remember seeing Maloney make his mark to his signature to the bond. Upon cross-examination the witness stated that he had no distinct recollection of Maloney being present, but was of the opinion that he was or had been, or the witness would not have appended his name. He had no recollection that the paper was read or explained to Maloney, who cannot read or write.

Jacob Underwood testified that he was in Green's store at Rockland on a Saturday evening in the latter part of April, 1881, between 6 and 9 p. m. He heard the bond read twice to Maloney in the presence of Conner and others, and saw Green, Maloney and Conner together at the desk behind the counter with pens in the

hands of Green and Conner. The bond was for over $1,200, and in response to an interrogatory Green explained that it had to be twice the amount due. Witness identified the bond in question and pointed out a blot which he had seen Green take off with a blotter. Did not see Maloney sign the bond or make his mark, but thinks he had a pen in his hand.

Other witnesses testified to hearing the bond read to defendant and seeing him execute it, and others to having heard defendant make statements acknowledging the debt and promising to pay.

Defendant could neither read nor write. Denied the execution of the bond or ever having owed plaintiff more than $150 at one time. Denied the evidence on the part of plaintiff as to the execution of the bond. Other evidence on the part of defendant tending to show fraud committed by plaintiff.

Walter H. Hayes and *Anthony Higgins*, for plaintiff.

Edward G. Bradford and *Lewis C. Vandegrift*, for defendant.

COMEGYS, C. J., charging the jury:

It is the law that fraud vitiates every contract. There is no exception to this rule. Where fraud is proved to have promoted the making of a contract, it is void and cannot be enforced. Fraud taints every transaction which is the result of it. The paper which you are required to pass upon, is in form a contract between Green and Maloney; whether it be a valid obligation, depends upon your finding of the issues you are drawn to try. They are now repeated:

"First: Whether or not the paper writing purporting to be a bond and warrant of attorney executed by John Maloney to Charles Green, under or upon which Judgment No. 458 of the November Term, A. D. 1880, was entered in the Superior Court of the State of Delaware in and for New Castle County in favor of the said Charles Green and against the said John Maloney, was the act and deed of the said John Maloney.

Second: Whether or not the said paper writing was signed, sealed and delivered by the said John Maloney, with knowledge at the time on the part of the said John Maloney of the character and contents of the said paper writing.

Third: Whether or not the said paper writing was procured

from the said John Maloney by the said Charles Green, by or through fraudulent representations by the said Charles Green to the said John Maloney as to the nature and character of the said paper writing.

Fourth: Whether or not the said paper writing was signed, sealed and delivered by the said John Maloney, by or through the fraudulent procurement of the said Charles Green.

Fifth: Whether or not the said paper writing was prepared or executed on the day it bears date, and, if not, in what year it was prepared or executed."

The first two concern the formal execution of the bond, that is, the signing of the same by the defendant. The next two concern the question of fraud in the transaction—the defendant in the controversy before you contending that if you are satisfied that the bond was signed with all due form, yet that it was so signed by reason of false and fraudulent representations or conduct on the part of the plaintiff intended to deceive the defendant, and which did deceive him. The remaining issue is whether the deed was dated at the time it purports to have been.

The first question therefore for you to determine is this—was the bond in controversy signed, sealed and delivered by the defendant Maloney to the plaintiff Green? The evidence upon that point is all before you in the testimony of the witnesses who have spoken to that point. It is conflicting, and you must reconcile it if you can; if you cannot you should incline your opinion upon this subject to that side whose testimony is the weightiest. The weight of testimony does not necessarily lie with the side which produces the most witnesses to prove a fact, but rather with that where the facts sworn to are most consistent with the probability of truth, taking in view all the facts and circumstances in evidence in connection with the case. It is proper to say to you that in every case where one party seeks to charge another with the consequences of an instrument of writing, it is necessary that he prove its due execution by the latter. This is done by calling the subscribing witness (if there be one) and examining him upon the point. If such witness prove his own hand-writing, and yet may not be able to prove anything more, that alone will be sufficient to prove the execution by the party to be charged; and if, as here, non-execution is

alleged, the duty devolves on the defendant to show that fact. But in this case, the plaintiff did not content himself with the proof he could make by the subscribing witness, Conner, but introduced and examined other witnesses, one to prove actual execution and the others circumstances surrounding the transaction and indicating execution—hearing the bond read in the defendant's presence at and immediately after the alleged execution, and the parties and subscribing witnesses being seen behind the counter with pens in their hands, &c. You will remember that Conner has no recollection whether or not Maloney had signed the bond when he put his name to it, that he did not hear it read to Maloney; and that Maloney himself swears not only that he did not sign the bond at that time or afterwards, but also that it never was read to him then, or at any other time. To this want of recollection on the part of the witness Conner, and positive denial of execution by Maloney, is opposed the testimony of Underwood, who swears that though he didn't see the bond signed, he heard Green read it behind the counter where it is alleged to have been signed, and that the parties had pens in their hands; that of Muir who swears that Green read the bond behind the counter to Maloney, and that he afterwards read the bond to him also after he came from behind the counter; and by that of James Green, the brother of the plaintiff, who swears he saw Maloney put his mark to the bond. There is also proof on the part of other of the plaintiff's witnesses that Maloney afterwards recognized in one way or another, as shown by them, indebtedness to the plaintiff. This testimony, coupled with the presumption of execution arising from the proof of the handwriting of the subscribing witness—if you believe such testimony to be reliable—would, if there were no other circumstances in the case, seem to justify the conclusion that the bond before you is the bond of the defendant Maloney. But there are other circumstances, of the efficiency of which (added to the negative testimony of Conner as to actual participation in the transaction by Maloney and the latter's positive assertion that he did not sign the bond to countervail and outweigh the testimony of the plaintiff witnesses) you and you only are to judge. One of these circumstances is, that the defendant is a wholly illiterate man. In cases of disputed execution merely, the evidence is the same in all

cases—the signing or acknowledgment of it. But no paper is valid to charge an illiterate man, one who can neither read nor write (as is the case with Maloney) unless it appear, upon a contest, that it was honestly and fairly read or explained to him, and was of such a nature that such a man could understand what it meant. It is of course not necessary, in such case of reading or explanation, to show that the illiterate did understand its contents and their nature; if, after a paper has been read or explained to him, he sign it, making no objection to it, nor request any explanation of it, he must, in all reason, be taken to have known what he was signing. And, in the absence of proof to the contrary, a paper read to a party and which he signed, is to be presumed to have been understood by him, and he will not be allowed to aver against it, unless he can show to the satisfaction of a court and jury that the paper was falsely and fraudulently read or explained, with intent to deceive and obtain the advantage of him. Another circumstance is, that the sum claimed for the defendant, that is, the real debt of the bond, is apparently large for a man in the defendant's circumstances, and represents a formidable degree of indebtedness on the part of a man of the defendant's means, and on account of such a claim as has been shown to have been the consideration of the instrument. The defendant had not then, nor has he now, any real estate whatever, and his support for himself and family is his own daily labor, as a worker in quarries, and that of his two minor children. The consideration of the bond was a store account, or a bill for store goods only, and that amounting to over six hundred dollars. It shows one thing certainly, a great liberality of credit on the part of the plaintiff in the conduct of his business as a country store-keeper. Another is the fact, sworn to by the witness Kalaher, that Green endeavored to get him last fall, two years and a half after the bond is alleged to have been executed, to acknowledge that when they were all of them together on the public road two years before and more than six months after the alleged signing, the bond was read to Maloney; and that in the December next following, that is last December, he in effect asked him whether he could then do so; and that he then replied to him *he did not hear the bond read.* A fact to be presented to you in connection with this is, that no proof has been offered to you that

the bond was then in the possession of Green, but in point of fact it ought to have been in that of James H. Hoffecker, Esq., whose authority to confess the judgment upon it was contained in the warrant of attorney at the foot of said bond, and not elsewhere.

As I have given you to understand, there is apparently greater proof of execution of the bond by Maloney than to the contrary—the fact of attestation by the witness Conner, the positive statement of Charles Green as to actual signing, and the evidence as to reading given by Underwood and Muir, being opposed by the positive testimony of Maloney alone, and that of Conner that he has no recollection of seeing Maloney's mark to the paper when he affixed his name to it, nor did he hear it read. To the latter however must be added the proved circumstances to which I have referred, and any others shown to you as concurrent with, or supportative of them. You of course remember all the proof.

If, after a calm review of all these facts and circumstances, you are of opinion that the mark made to the bond before you is the mark of Maloney, and that the bond was read to him before he signed it, as stated by some of the plaintiff's witnesses, then your verdict will simply be an affirmative answer to each of the issues or questions. If, on the contrary, you do not believe from the evidence that Maloney put his mark to the bond, you should answer negatively to the first and second issues. If, however, you should answer affimatively to them, and yet believe, from the circumstances proved before you, that the bond was not read over, or explained to the defendant, and that for want of this course he did not know what amount of money he was binding himself to pay by singing it—especially when you take into consideration a fact sworn to by the defendant that he applied to the plaintiff three different times before the day of the alleged execution for an account of his indebtedness which he was never able to obtain, he says—you should find for the defendant by answering in the affirmative the three remaining questions, or issues.

Gentlemen: the case is all before you, and the degree of weight you are to give to the witnesses and the facts and circumstances proved, is for you alone. Another word, and then I shall deliver the case to you.

The defence against this bond is fraud—which it is only

necessary for this case to say, means deception, artifice, misrepresentation, concealment. Where these, or any of them, exist in a transaction by which another person is sought to be charged with liability, the thing done is void. Fraud, however, is not in any case to be presumed merely—that is taken for granted without proof—but is to be proved. Now this proof may be as well made by circumstances proved which support the charge or allegation of it, including the conduct of a party as by positive testimony, which I need not say to you can rarely be offered.

To each of the first four issues the jury answered "It was," and to the fifth issue they answered "It was not."

Judgment set aside.

COURT OF ERRORS AND APPEALS,

JUNE TERM,

1884.

JAMES BRADFORD, appellant *v.* ALFRED S. ROBINSON, LOLA D. ROBINSON, MARIA ROBINSON, ROBERT E. ROBINSON, and MARIA J. ROBINSON, widow and Administratrix of ROBERT E. ROBINSON, deceased, defendants.

Infant Trustee—Partition in Chancery between Tenants in Common.

Under the statute law of this State, where a trust is established in a suit in equity, instituted for that purpose, all the parties in interest having been heard, a decree against an infant is as effectual as against persons *sui juris*.

Nevertheless a minor is entitled to a rehearing if applied for within six months and to an appeal within two years after his disability ceases.

No distinction now exists between express and constructive trusts.

The ancient jurisdiction of the Court of Chancery to order partition between tenants in common is not affected by the statute law of this State; and where the assistance of the Court of Chancery is otherwise needed in adjucating between tenants in common, partition may be ordered where it will promote the several interests of the litigants and it is prayed for in the bill.

(*June 20, 1884.*)

APPEAL from the *pro forma* decree of the Court of Chancery, in and for New Castle County.

The allegations of the Bill, not denied by the answers and established by the proof in the cause, are as follows:

On the 2d day of June, A. D. 1873, the complainant, together with Robert E. Robinson, late of the City of Wilmington, deceased, purchased at public sale, for the sum of $1050, a lot of land situated in Wilmington, New Castle County aforesaid. The property was bid off by Robinson, and complainant paid him one-half the

purchase money. For convenience, and with the consent of complainant, a deed was executed and delivered to the said Robinson, conveying to him the entire title in fee simple, to said premises, with the expressed understanding that he, the said Robinson, should hold the title subject to the right of the complainant to one equal undivided half part thereof.

At the time of the death of the said Robert E. Robinson, to wit, the twenty-third day of November, A. D. 1875, the legal title to said premises still remained in him, and at his decease, there were left to survive him as heirs at law, his widow, the said Maria J. Robinson, and four children, the said Alfred S. Robinson, Lola D. Robinson, Maria Robinson and Robert E. Robinson, to whom the legal title to said premises descended, subject to the said resulting trust in favor of the complainant.

Of the defendants, Lola D. Robinson, Maria Robinson, and Robert E. Robinson were infants under the age of twenty-one years at the filing of the bill, but the said Lola D. Robinson has arrived at the age of twenty-one years since the suit was commenced.

The Bill prays:

1. For decree declaring that the heirs at law of said Robert E. Robinson, deceased, hold the said premises subject to a resulting trust as to one equal undivided half part thereof in favor of complainant.

2. For decree for conveyance to complainant, by parties holding legal title, of one equal undivided half part thereof.

3. For partition of said premises among the parties entitled, or for sale by a trustee to be appointed by the Court, and distribution of the proceeds among those entitled.

The joint and several answers of Alfred S. Robinson, Lola D. Robinson and Maria J. Robinson, widow and Administratrix of Robert E. Robinson, deceased, admit all the allegations of the Bill, and they submit themselves to such order or decree as the Chancellor may deem proper in the premises.

The joint and several answers of Maria Robinson and Robert E. Robinson, minor children of Robert E. Robinson, deceased, by

Maria J. Robinson, their Guardian, without either admitting or denying the facts set forth in the Bill, submit themselves and their interests in the property, matters and things mentioned in the bill to such order or decree as the Court may deem proper in the premises.

The deposition of Henry C. Robinson, brother of Robert E. Robinson, deceased, and uncle of the minors, was taken, proving all the facts as alleged, and that the payment of one half of the purchase money was made by complainant through the witness to his brother.

There was no controversy in the case, either as to law, or fact, the proceeding being amicably conducted, and being considered by the widow of Robinson and his brother, the witness, as necessary for the interests of Robinson's estate, as well as of the complainant. The resulting trust being clearly proven, the Chancellor was prepared, upon examination of the papers, to make a decree enforcing the same and directing conveyance to the complainant of one equal undivided half part of the premises in question; but a question arose whether an immediate conveyance could be decreed as against the infant defendants, or whether it was necessary that the decree should contain a clause giving to the infants their day after reaching the age of twenty-one, to show cause against the decree.

It was also prayed by the bill, and desired by all parties to the proceeding, that partition should be decreed in this cause; and as to this, a question also arose whether the partition could be made under the present proceeding, or whether it was necessary for the parties to proceed under the statute by petition. This involved the question whether the statutory jurisdiction of the Court of Chancery in this State, in cases of partition, excluded the ancient jurisdiction of the Court of Chancery to decree partition upon bill filed. These questions involving title to land, and being important ones, it was concluded by the Chancellor, upon the suggestion of counsel, and with the consent of all parties, to enter a *pro forma* decree declaring the trust and decreeing the conveyance, and giving the infant defendants their day. From this decree, with the approval of the Chancellor, an appeal has been formally taken, in order to bring the questions involved before this Court for an authoritative decision. The decree entered below was as follows:

DECREE.

AND NOW, to wit, this 20th day of December, A. D. 1883, the above stated case having been heard upon the bill, answer and proofs, and the same having been considered by the Chancellor, and it appearing to the Court that the real estate mentioned and described in the bill of complaint in said cause was held by Robert Emmett Robinson until the date of his death, under and subject to a resulting trust therein as to an equal undivided half part thereof in favor of James Bradford, the complainant in this cause, it is ordered, adjudged and decreed, by consent, *pro forma*, that the defendants, as heirs at law of Robert Emmett Robinson, deceased, have, since his death, held the equal, undivided half part of said real estate, and still hold the same, subject to a resulting trust in favor of the complainant, and that said complainant is entitled to an equal undivided half part, share or interest in said real estate in fee simple.

And it is further ordered, adjudged and decreed, by consent *pro forma* as aforesaid, that the said Alfred S. Robinson, Lola D. Tatnall, formerly Lola D. Robinson, Maria Robinson and Robert E. Robinson shall convey the legal title of said one equal undivided half part of said real estate to the said James Bradford, the complainant, in fee simple, and that said Maria J. Robinson, widow of the said Robert E. Robinson, deceased, do join in said conveyance.

And it further appearing that the said Maria Robinson and Robert E. Robinson are infants under the age of twenty-one years, the said Lola D. Tatnall, formerly Lola D. Robinson, having, since the filing of the bill in this cause, attained that age, it is further ordered, adjudged and decreed, *pro forma* as aforesaid, that this decree is to be binding upon the said Maria Robinson and Robert E. Robinson unless they or either of them, being served with a subpœna to show cause against the same, shall, within six months after they shall respectively attain the age of twenty-one years, show unto this Court good cause to the contrary.

And it is further ordered that the costs of this cause be paid by the parties respectively in the proportion of their several interests in the said lands and premises and that this decree is made

without prejudice to the right of either party to appeal to the Court of Errors and Appeals.

The appellant files the following causes of appeal, to wit:—

1. For that the Chancellor erred in not decreeing that the said infant defendants, Maria Robinson and Robert E. Robinson, should immediately join in the deed conveying the undivided equal half part of the said real estate to the said complainant, and in allowing the said infant defendants their day.

2. For that the Chancellor erred in decreeing that the said infant defendants, Maria Robinson and Robert E. Robinson, should have their day after arriving at the age of twenty-one years to show cause against the said decree.

3. For that the Chancellor erred in not decreeing the partition or sale of the said lands and premises as prayed in the complainant's said bill of complaint.

Austin Harrington, for appellant:

I. Under our statute, where an infant is held to be a trustee under any trust, whether express, constructive or resulting, a decree for a conveyance may be made against such infant as if he were of lawful age. And, therefore, in the present case, the complainant was entitled to an absolute decree for the conveyance by the infant defendants without the addition of the clause allowing them a day to show cause against the decree.

The discussion of this general proposition involves the critical examination of the English Statutes upon the subject of the conveyance by trustees under disability, under the direction of the Court of Chancery, and also, of those of our own State.

There is no question that originally, and independent of statutory provisions, either in England or this State, in any decree against an infant, he must be allowed his day to show cause after he came of age.

In England, the Act I. Will. IV. c. 60, commonly known as Sir Edward Sugden's Trustee Act, finally perfected the legislation under which the English Court of Chancery is enabled to decree the conveyance of a trust estate in the many cases in which the trustee is laboring under a disability.

This Act was passed in 1830. Prior to this Act, the Act of 7 Anne Ch. c. 19, enabled infant trustees to convey by direction of the Court of Chancery to be made upon petition.

This Statute, and others of a kindred nature, concerning lunatic trustees &c., were repealed and their provision re-enacted and extended by the Act of 6 Geo. 4. c. 74. This law was the first statute which was held in England to apply to infant or lunatic trustees, who had any beneficial interest or claim, or any duties to perform. The prior Statutes had been held to apply only to dry trustees. The Act of 6 Geo. 4. c. 74, however, extended the jurisdiction of the Court to trustees having an interest or duty to perform, but did not apply to trustees in constructive trusts, except where the existence of the trust had been determined by a decree, prior to the devolving of the trust on the infant.

The Act I. Will. IV., after providing specifically, in the sixth section, for the conveyance by infant trustees under the direction of the Court of Chancery, afterwards, in the 18th section, extends the previous provisions of the act, including those in relation to infant trustees, to every case of construction or resulting trust, and in the 16th section, the provisions of the act are expressly applied to the case of a resulting trust where a purchase of land is made by one person in the name of another.

For the course of English Legislation upon the subject see *Hill on Trustees*, part 2, Ch. 4, Sec. 3.

The Delaware Statute, in relation to the Court of Chancery, *Rev. Code* Ch. 95, Sec. 13, provides for the conveyance of real estate held in trust by an infant trustee, under direction of a Court of Chancery, in the same manner as is provided in the English Statute I. Will IV. These sections were first enacted in 1806, being sections 11 and 12 of Chap. 21, 4 Del. Laws.

The Act of 1806 was passed before there had been any provision in the English Statutes for the conveyance by an infant trustee in cases where the trust was other than a dry trust: and the language of the Act of 1806 would seem to be intended to conform to the English course of legislation. Section 11 provides that persons "under the age of 21 years having estates in lands, "tenements and hereditaments in trust *only* for others," may convey, &c., under the direction of the Court of Chancery.

In the Digest of 1829, page 109, the section remains unchanged, retaining the word *only*, but in the *Revised Code* of 1852, the Sections 11 and 12 in question were remodelled and embodied in Sec. 13, Chap. 95, and the word *only* stricken out; so that it shall read "any person under the age of twenty-one years having real estate in trust for others may, &c."

It must be presumed that the Legislature intended by this change to give to the new section a different effect from that which properly belonged to the old one. At the time of the enactment of the Act of 1852, the whole subject of conveyance by trustees laboring under any incapacity, had been the subject of a progressive system of legislation in England which culminated in the Statute of I. Will. IV., before referred to, and which was passed in 1830, subsequent to the digest of 1829, and about twenty years prior to the time of the revision of 1852. The presumption that a change in the Statute was intended by the omission of the word *only*, would apply, even if it were an ordinary act of legislation; but in this case, it gathers additional force from the fact that it was not a casual act of legislation, but formed a part of the careful and systematic revision of the whole body of our Statute Law, made, not by laymen, as members of the Legislature usually are, but by three lawyers, all of whom subsequently held the highest judicial positions in the State. It is not only presumable, but it is known to this Court, that these revisers were, all of them, thoroughly acquainted with the course of legislation in England upon subjects of this kind; and it is a most natural conclusion that the change referred to in the section under consideration was made for the express purpose of bringing the Statutory provision of our own State upon this important subject, into exact consonance with the well matured system of legislation in England. It is hardly necessary to add that the change of this section was made by these revisers, and appears for the first time in the Code of 1852, there having been no amendment of it by any Act of Assembly passed between the Digest of 1829 and the Code of 1852.

A strong incidental confirmation of the view here expressed, as to the purpose of the revisers of 1852, will be found in a note on page 94 of the *Equity Rules and Forms* prepared by Chancellor Bates. Among the Chancery Statutes therein re-printed from the

Revised Code, is the Act of March 1st, 1853, 11 *Del. Laws, p.* 83. This was an act providing for the conveyance by trustees under disability. This act is said to have been drawn by Chancellor Bates, but whether this be so or not, he was undoubtedly familiar with its scope and intention. His note to this Act is as follows: "This Act is framed after the English Statute known as Sir E. "Sugden's Trustee Act, 1 Will IV., Ch. 60. For the provisions "of that Statute and the course of decisions under it, see *Hill on* "*Trustees, Part II., Ch.* 4, *Sec.* 3; *Lewin on Trusts*, 24 *Law Lib.*, "440. The case of an infant trustee, embraced in the English "Statute, is omitted in this act, probably because it had been pre- "viously provided for by *Rev. Code, Ch.* 95, *Sec.* 13."

This act of 1853, was undoubtedly intended to provide for conveyance by trustees under disability, excepting infants (who are omitted,) in all such cases as were comprehended by the English Act I. Will. IV. In the note just cited, the omission of the case of the infant is referred to, and it is suggested that the omission was probably made because that case had been previously provided for by the *Revised Code, Ch.* 95, *Sec.* 13, the effect of which we have been considering.

It is almost impossible to conceive that, after all the disadvantages and troubles which in England led up to the passage of the Act of Will. IV, by reason of the provision for conveyances by trustees under disability having applied only to the case of dry trusts under the Statute of Anne but being extended to every case of constructive or resulting trusts, under the Act of Will. IV, that either the revisers of 1852 or the draughtsman of the Act of 1853 could have intended to frame so weak and ineffective a statute as that which had existed in England nearly a century and a half before, and which had been finally superseded by the complete system embodied in the Act of Will. IV, nearly a quarter of a century before. No better illustration could be found of the difficulties arising from the narrow construction of our own Statute in such cases, than that presented to the Court in this very case, in which the complainant is entitled to a resulting trust in one half of an unimproved lot which, under the existing decree of the Chancellor, must remain in such condition that it cannot be sold or improved for about nine years—the period which would elapse before

the youngest infant defendant reaches the age of twenty-one years. Every consideration therefore which influences a Court of last resort in giving a construction to such a statute as this, is in favor of that interpretation for which we contend.

(1.) It would make our law consistent with the English system, which we have always followed in legislation, in practice in the courts of law and equity and in judicial construction. Our whole system of statute law is based upon the English Statutes, much of it being taken *verbatim*; and where it is not so, it is universally the practice of our courts to consider the effect of English Statutes, and the construction that has been given to them by English courts, in construing our own acts of legislation.

(2.) The broader construction is perfectly consistent with the language of the Statute. It is entirely within the competence of this Court to give that construction to it, and to do so would prevent a *hiatus* in the law which it would be manifestly necessary to have corrected by additional legislation, as well as to relieve, in the present case and others like it, great hardship and disadvantage.

(3.) In the present case, the Court deals with the construction of these statutes *de novo*, and unfettered by any previous judicial decision. Of two constructions, they will, therefore, incline to that which will most tend to promote the general welfare, and to avoid unnecessarily complicating title to land and causing hardship and inconvenience to innocent parties.

(4.) The tendency of our own Statute law is in favor of the final adjudication of the rights of infants in land in which they have a right in common with other persons. This is shown by our system of partition in Chancery, in which the rights of infants are finally adjudicated, the Court of Chancery always being not only competent, but ready to afford them adequate protection, as was shown in the present case, in which, although there was no dispute as to the facts, the Court of Chancery required the facts upon which the resulting trust rested, to be proved, and would not permit them to be confessed so as to bind the infants.

All of the English cases prior to the trustee acts before referred to, have no relation to these points; and after the conclusive disposition of the subject of infant trustees made by the Act of I. Will. IV, the question could not, of course, arise in that country.

There are few cases not directly in point, but illustrating the tendency to extend the effect of the English legislation as much as possible by judicial construction.

In *Peyton v. McDermott*, 6 Ir. Eq. R., 220, it was held that the infant tenant in tail of lands decreed to be sold for an equitable charge is a trustee under the 8th and 18th sections of the I. W. 4. c 60.

In *Jones v. Ham*, 3 Ir. Eq. R., 65, it was held that an infant defendant entitled to a portion of the equity of redemption of lands decreed to be sold in a foreclosure suit, was ordered to execute the conveyance to the purchaser. The decree did not give him a day to show cause on coming of age.

In most of the United States will be found early decisions that where a conveyance was directed to be made by an infant defendant, he must have a day to show cause. Such, in our own State, was the case of *Lockwood v. Stradley*, 1 Del. Chy., 298, which, however, only established the principle here admitted, that generally in decrees against infants, a day must be allowed to show cause. That case was not at all like the present one; nor was it a case where an infant was decreed to be a trustee. In the course of the informal consideration of this case in the Court below, the Chancellor referred to a case in Massachusetts, which he had once seen, but was not able to refer to, in which the infant defendant was represented by the late Judge Curtis. This case, upon careful examination, we presume to be *Coffin v. Heath*, 6 Metc., 76, and upon examination, it will be found not to have any application to the present case.

There is, however, a later Massachusetts case, *Walsh v. Walsh*, 116 Mass., 377, in which it was held that a decree against an infant trustee, even when the trust results by implication of law, is not erroneous for want of allowing him a day to answer after coming of age.

There has been passed in Massachusetts, as in our own State and most others, a statute providing for conveyances under a decree of the court of equity by infant trustees, and the Supreme Court of Massachusetts held that, since the passage of this statute, it was not necessary to insert in the decree a clause giving the infant defendant a day to show cause. The exact terms of the Massachu-

setts Statute did not appear, but from the substance of it, as given in the case referred to, it appears to have the same effect as that which we have contended should be given to our Statute.

There is a case much referred to in connection with the subject of giving the infant his day, *Harris v. Youman*, 1 Hoffm., 178. This case, however, upon examination, will be found not to apply to the case of an infant trustee. A careful examination of the Digests has failed to disclose any cases in point, and suggests the inference that, in most of the states, the enactment of statutes following the general course of the English legislation, and similar in effect to our own, has made the question of giving the infant a day in cases like this one not likely to arise.

II. In cases to which the Statute applies where a case is plain, and the trust is declared by decree, it is unnecessary that a petition for a conveyance should be filed, but the conveyance will be directed in the same decree. This is the established practice in England in cases arising under the Statute of Will. IV, in which the provisions for a conveyance upon petition are exactly the same as those of our Statute.

Miller v. Knight, 1 Keen, 129; *Broom v. Broom*, 3 Myl. & K., 443; *Clinton v. Bernard*, 6 Ir. Eq. R, 355.

III. Where the Court of Chancery decrees land to be held by the parties as tenants in common and partition is prayed it should be decreed without requiring the parties to resort to a petition under the Statute.

The Statutory jurisdiction for partition upon petition is permissive and not intended to supersede the equitable jurisdiction to make partition upon bill filed.

That it was entirely within the province of the Chancellor to have decreed a partition in the cause, is clearly shown in the case of *Marshall et. al. v. Rench et. al.*, 3 Del. Chy. Rep., 239.

The jurisdiction of equity to make partition of lands is a very ancient one.

1 Story Eq. Jur., Sec. 646.

It is a general principle that the Court of Equity, having acquired a jurisdiction for any purpose, will hold it even for purposes which are not ordinarily within its general jurisdiction.

1 Story Eq. Jur., 564-66.

A fortiori having acquired jurisdiction of the subject matter for one purpose the Court will hold it for all purposes within *its own* general jurisdiction.

The Statutory proceeding for partition upon petition does not oust the original jurisdiction of the Court of Chancery to entertain a bill for partition. Our Statute, *Rev. Code*, Ch. 86, Sec. 8, by its terms, provides only that persons who hold as joint tenants, or tenants in common, *may* prefer a petition to the Chancellor of this State; it is not obligatory.

In the present case, the Court having decreed a resulting trust and a conveyance under its general powers, could have disposed of all other questions affecting the property.

The bill prayed for partition and other relief; the right of partition was established by the decree declaring a resulting trust and directing a conveyance, and it was entirely competent for the Court, in the light of the authority cited, in the exercise of its general jurisdiction over such subjects, to have included an order for partition, and thus relieve the parties from the inconvenience and expense attending a new proceeding by petition for that purpose.

Rann v. Rann, 95 Ill., 433; *Allnatt on Partition*, 5 (Law Lib.) 34.

Where it is manifestly for the interest of an infant, a Court of Chancery will authorize a sale of his real estate.

Ex parte Jewett, 16 Ala., 409; *Clifford v. Clifford*, 1 Desaus., 115; *Huger v. Huger*, 3 Id, 18; *Stapleton v. Langstaff*, Id, 22; *Livingston v. Livingston*, 2 Johns Ch., 537; *Scholefield v. Heafield*, 8 Sim., 470.

George H. Bates, for defendants.

COMEGYS, C. J.: It appears, by the proceedings in the Court below, that the case before this Court is one where the ancestors of the heirs at law defendants, and husband of the other defendant, was seized at the time of his death intestate of an equal undivided half part of the premises described in the bill as a trustee for the complainant in and by a constructive trust arising out of the circumstance of the said premises having been purchased by the intestate for the use and benefit of himself and the complainant,

who paid one half of the purchase money thereof, but to whom no title was made, the intestate alone taking it by an unobjectionable arrangement between them. These facts supporting the allegations of the complainant's bill, were all established in the suit below, to which all the heirs at law of the intestate who were of age, and his widow aforesaid appeared and filed their answers admitting such facts, and submitting to decree as prayed for; and the minors, or those not of age, viz, Maria Robinson and Robert E. Robinson appearing by their guardian and answering in the usual manner.

The bill prays that the heirs at law of the intestate be decreed to hold a moiety of the property in trust for the complainant; that a conveyance to him be decreed, and that partition be made among the parties entitled.

The decree establishes the trust, and directs the conveyance prayed for; but, as to the minors aforesaid, provides, *pro forma* that it is to be binding upon those who were minors at its date, unless they or either of them, being served with process to show cause against it, shall, within six months after their respective majority, show unto the Court good cause to the contrary.

The causes of appeal are, substantially, these—that the Chancellor erred in postponing the time when the decree should take effect as to the minors until they respectively come of age; or in other words, allowing them a day in court; and that he also erred in not decreeing partition as prayed for in the bill.

It is true, as contended for by the complainant's solicitor, that in the case of what is called a dry trust, one without any benefit to the trustee, the decree is to be performed by infant trustees like those *sui juris*, no day in Court being allowed them to show cause against it. But a different rule prevailed where trustees were infants and had any beneficial interest in the trust property—for example, claimed to hold it absolutely at law. In such a case, the law was, that as their answers, filed as they were by guardians of the usual kind or *ad litem*, neither admitted nor denied anything, but submitted their interests to the Chancellor, to be decided according to equity, they should be allowed six months after they arrived at age to appear and oppose the decree, if made against their supposed interests. As this practice was very inconvenient, postponing the actual acquisition of the legal title to a day, some-

times remotely distant, an act of parliament was passed in England in the first year of William IVth, (1830) which changed the course of practice above stated, the courts afterwards making no provision for a day in behalf of an infant trustee defendant.

The act of assembly of this State, to be found published in Hall's Digest, page 109, provides for decrees to be made against infant trustees for conveyance of the trust estates, but limits its operation to cases where the trust is "*only for others.*" Such is the law now, with the important modification made by striking out in the Revised Code of 1852, republished in 1874, the word *only* above quoted. The present law is to be found in the republication at page 571, and is contained in the following section of Chap. 95:

"SEC. 13. Any person under the age of twenty-one years, having real estate in trust for others, may, by direction of the Court of Chancery, given upon hearing all the parties concerned on the petition of those for whom such infant is trustee, or of the guardian of such infant, convey and assure such real estate in such manner as the said court shall direct, to any other person; and such conveyance shall be as good and effective in law as if the said infant was of full age; and such infant may be compelled to execute such order, in like manner as trustees of full age are compellable to convey or assure trust estates."

It seems quite sufficiently certain that dropping the word "only" from the old act, as by the above section, must have been intended to conform our legislation to that of England under the act of parliament above referred to; and that now here, as there, where a suit is instituted to establish a trust, and the parties are heard in it, a decree against an infant is as effectual as are against persons *sui juris*. This, in fact, is no hardship upon a minor, as by the practice of the Court he is entitled to a rehearing if applied for in six months after he arrives at age, and also to an appeal at any time before the expiration of two years from the time his disability ceases. No distinction exists now, with respect to the jurisdiction over infant trustees, between express and constructive trusts. See *Walsh and another v. Richard J. Walsh and others*, 116 Mass., 377, and the cases there cited. This case established a different rule from that laid down in *Coffin v. Heath*, 6 Metc., 76, and under a statute similar in effect to ours above quoted. We are therefore

of opinion that the *pro forma* part of the decree should be reversed and we order accordingly. And we do not see how any question could well arise as to the effect of a decree in a case like that before us. The trust is established. The infants therefore hold, as trustees, only the legal title in their shares in the moiety upon which the trust is fastened:—their right to a rehearing, or appeal does not affect this view.

With respect to the cause of appeal—that the Chancellor did not decree partition—we are of opinion that the ancient jurisdiction of the Court of Chancery to order partition between tenants in common is not affected by the statute law of the State, where, in adjudicating between parties holding joint interests in law it will promote the several interests of the litigants that partition should be made, and it is prayed for in the bill, and the assistance of the Court for some of the purposes peculiar to its jurisdiction are needed. We do not see that any aid from the Court is requisite in this case; and, therefore, shall decline to decree partition, leaving the appellant to his remedy under the statute—which is so much better than that by bill, as in it valuation and sale can be had where partition would be detrimental.

DAVID H. COYLE, plaintiff in error, *v.* GEORGE GRAY, Attorney General of the State of Delaware, who sues for the said State, *ex relatione*, HENRY B. MCINTIRE, defendant in error.

Municipal Corporation—Legislative Control.

A corporation is an artificial being and possesses such powers only as are conferred upon it by its charter, either expressly or as incidental to its existence.

A municipal corporation is a body politic and corporate established by law to assist in the civil government of the State with delegated authority to regulate and administer the local or internal affairs of a city, town or district which is incorporated; and is created exclusively for the public advantage without other endowments than such as the government may bestow upon it, and may be controlled and its constitution altered and amended by the legislature in such manner as the public interest may require. There is but one party to it and therefore it is not founded upon contract.

The city of Wilmington is a public municipal corporation. It is merely a revocable agency instituted by the State for the purpose of carrying out in detail the objects of government. It has no vested right to any of its powers or franchises. It can acquire and hold property for public uses only. Its charter, or act of incorporation, is in no sense a contract with the State. It is subject to the control of the Legislature who may enlarge or diminish its territorial extent or its functions, and may change or modify its internal arrangement or destroy its very existence at discretion without the consent or even against the will of the inhabitants. None of its franchises, rights or powers are held independently of or in defiance of the Legislature. The Legislature may appoint all or any of the corporate agencies through which it acts.

The act of the Legislature establishing a Board of Water Commissioners for the city of Wilmington is constitutional and valid; and the commissioners appointed by the Legislature in said Act may remove the chief engineer of the Water Department of the City of Wilmington, who was appointed by the City Council, and appoint another in his place; and by mandamus may require the said chief engineer to surrender his office and the property connected therewith to his successor thus appointed.

(*July 22, 1884.*)

ERROR to the Superior Court in and for New Castle County.

INFORMATION in the nature of *quo warranto.*

Statement of facts appear in Opinion of Court on page 84.

Edward G. Bradford, Jr., for plaintiff in error:

The judgment in this case was rendered upon an information in the nature of a writ of *quo warranto* against David H. Coyle, for an alleged usurpation of the office of Chief Engineer of the Water Department of the City of Wilmington.

Prior to the passage of the act of April 13, 1883, entitled

"An Act to Revise and Consolidate the Statutes relating to the "City of Wilmington," *17 Del. Laws, 424*, the "Mayor and "Council of Wilmington" was by its charter authorized and empowered to purchase or erect pumps, or any other apparatus, for supplying the citizens of Wilmington with good and wholesome water, to repair and amend the same, and to assess and receive a tax therefor; also to construct reservoirs, to improve the water works of the said city, and to enlarge the conveniences for supplying the citizens of said city with water; also to acquire, hold and dispose of real and personal property for these purposes, and to borrow divers sums of money for the same purposes, and to issue its bonds to secure the repayment of the loans.

In the exercise of the power and authority so conferred the said corporation did, prior to the passage of the Act of April 13, 1883, have full control of all matters relating to water supply in Wilmington, and did acquire, hold and own a large amount of real and personal property to that end.

At the time of the passage of the Act aforesaid, under and by virtue of divers ordinances of the said corporation, the Chief Engineer of the Water Department was entitled to the charge and care of the water works of Wilmington, and the property connected therewith, subject to the general superintendence and direction of the Water Committee of the City Council, and to the control of said Council.

Under and by virtue of the ordinances of the said corporation, David H. Coyle was elected Chief Engineer of the Water Department, by the City Council, at its first stated meeting in December, 1882. He afterwards duly qualified for the performance of his official duty, and on the first day of January, 1883, entered into office and has since continued the legally elected and duly qualified Chief Engineer, save in so far as his official tenure may have been terminated by reason of the facts hereinafter stated.

The Act of April, 1883, does not in any of its provisions mention or specifically notice the Water Department of the City of Wilmington, nor does it abolish the Department, or in any way interfere with its organization or property.

§§ 1, 151, Act of April 13, 1883, 17, *Del. Laws*, pp. 425, 492.

The Act of April 18, 1883, entitled "An Act to Establish a

Board of Water Commissioners for the City of Wilmington, and for othor purposes," *17 Del. Laws, 408*, although unconstitutional and void, it is submitted, amounts to a legislative recognition of the existence at that time of the Water Department, with its organization unaffected by the Act of April 13, 1883.

The central question in the case is not one of political expediency or propriety, but of legislative power.

Had the legislature the power, under existing circumstances, to take from the "Mayor and Council of Wilmington" the management and control of its Water Department, and of all matters and property connected therewith, without the consent and against the will of the said corporation, and vest the management and control of the same in a Board of Water Commissioners, not elected or appointed by the City of Wilmington, or any of its authorities, but named in the Act creating the Board?

A municipal corporation proper, like a private corporation, is an artificial, legal being, or person, created for certain purposes, and not possessing any other powers, or faculties, than those which the law has, either expressly, or by fair implication, conferred upon it.

But although a legal, artificial person, a municipal corporation is by no means a mere abstraction.

Dillon says: "Persons residing in or inhabiting a place to be "incorporated, as well as the place itself, are—both *the persons* and "*the place*—indispensable to the constitution of a municipal cor-"poration."

1 Dillon Mun. Corp., 3d Ed.; §§ 14, 19, 21, 66, 183.

It is to be presumed that the Legislature, in granting any charter of incorporation, intends to benefit the community, or to a certain extent promote the general welfare.

But the fact that the objects to be attained by a corporation may be attended with benefit to the community, or connected with the general welfare, or be of incidental advantage to the public, will not make the corporation a *public* one.

Dartmouth College case, 4 Wheaton, 518, 637, 669, 671; *Allen v. McKeen*, 1 Sumn., 276, 296–298.

A municipal corporation proper is unquestionably a public corporation, in the proper sense of the term, in so far as it has been

created and made to serve as an agency or representation of the State government, in the exercise of the duties and franchises of sovereignty.

But the fact that a municipal corporation proper is a public corporation, is not in the least inconsistent with the proposition, that in the discharge of many of its functions, and with respect to rights of property, it may be clothed with the character of and may be, a *quasi*-private corporation.

It is not necessary to contend that a municipal corporation proper can be at once, in fact, a public and also a private corporation.

But that it may be a quasi-private corporation, and, in relation to its purely local concerns, clothed, in most respects, with the rights, immunities and liabilities of a private corporation, there is no reason to doubt, either upon the authorities or the reason of the case.

Dartmouth College Case, 4 Wheaton, 636; *State Bank of Ohio v. Knoop*, 16 How., 369, 380, 381.

In the exercise, then, of powers and franchises which affect the locality and do not form part of the civil government of the State, or contain the essential elements of sovereignty, a municipal corporation proper is no more "a State instrument," than any private corporation endowed with similar powers and franchises.

It is not a mere agency of the State for the execution of State purposes, and, therefore, in the exercise of such powers and franchises, it is a *quasi*-private corporation.

The authorities recognizing the dual nature of municipal corporations proper are numerous.

Lloyd v. Mayor, &c., of New York, 5 N. Y., 369; *Holland v. San Francisco*, 7 Cal., 361, 376, 377; *Bailey v. The Mayor, &c., of New York*, 3 Hill, 531, 539; S. C. 2 Denio, 433, 442, 445, 450, 451; *Patterson v. Society, &c.*, 4 Zabr., 385, 393, 399; *Jones v. New Haven*, 34 Conn., 1, 9, 12; *Rochester White Lead Co. v. Rochester*, 3 N. Y., 463; *Rittenhouse v. Mayor, &c., of Baltimore*, 25 Md., 336, 346; *Western College, &c. v. City of Cleveland*, 12 Ohio, N. S., 375, 377; *Milhau v. Sharp*, 15 Barb., 193, 194, 212, 213; *Touchard v. Touchard*, 5 Cal., 306, 307; *City of Richmond v. Long's Adm's*, 17 Gratt., 375, 379; *Murtaugh v.*

St. Louis, 44 Mo., 479; *Hannon v. County of St. Louis*, 62 Mo., 313; *Small v. Danville*, 51 Me., 359; *County Commissioners v. Duckett*, 20 Md., 468; *Hewison v. City of New Haven*, 37 Conn, 475, 483, 484; *Maxmilian v. Mayor*, 62 N. Y., 160, 164; *Hill v. City of Boston*, 122 Mass., 344, 359; *Barnes v. Dist. of Columbia*, 91 U. S., 540, 552; *Cooley on Taxation*, 482; *Commissioners, &c. v. Lucas*, 3 Otto., 108, 115; *Read v. Plattsmouth*, 17 Otto., 568, 576.

The furnishing the citizens of Wilmington with water is not essentially either a franchise or a duty of the State sovereignty.

A number of persons might be incorporated for the purpose of constructing reservoirs, and furnishing and selling water to the citizens of Wilmington; yet such a corporation could no more be said to discharge a *public* duty, or to represent the State, than could the individual.

In either case the water supply would be a matter of private concern with respect to the State, as it could not involve the exercise of any exclusive power or franchise of the State sovereignty.

In the case of the corporation above supposed, the franchise is granted merely for the purpose of enabling the corporators and their successors, as an artificial, legal person, to do what the individuals would have the right under the general law of the State to do, without special legislative authority.

Any and all property acquired, held and owned by such individuals or corporation, for such purpose, would be their or its own private property.

That the Legislature has, instead of incorporating an independent company for the purpose of supplying the citizens of Wilmington with water, conferred upon the Mayor and Council of Wilmington such power, can make no difference in the nature of the franchise.

Therefore, with respect to the water supply and the property held and owned in connection therewith, the Mayor and Council of Wilmington is a *quasi*-private corporation.

Bailey v. The Mayor, &c., of N. Y., 3 Hill, 531, 539, 543; *Western Saving Fund Society v. Philadelphia*, 31 Pa. St., 175; *Wheeler v. Philadelphia*, 77 Pa. St., 338; *City of Detroit v. Corey*, 9 Mich., 165, 184; *Gas Co. v. San Francisco*, 9 Cal., 453, 468;

Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn., 19, 37; *Eastman v. Meredith*, 36 N. H., 284, 291, 295; *Darling v. Mayor, &c., of Baltimore*, 51 Md., 1, 12; *Aldrich v. Tripp*, 11 R. I., 141, 146; *Cooley's Constit. Lim.*, 253; *Dillon's Mun. Corp.*, 3d Ed., Sec. 58; *Cincinnati v. Cameron*, 33 Ohio St., 336, 367, 368; *Cooley on Taxation*, 482.

That the water supply is used in connection with the fire hydrants of the city does not remove from the Water Department, and the property connected therewith, their private character.

It might equally be objected that gas is used for the purpose of lighting the streets of a city, and that, therefore, the gas works are not its private property.

The property connected with the Water Department being the private property of the Mayor and Council of Wilmington, as a *quasi*-private corporation, had the Legislature the power to transfer the management and control of the same from the said corporation to a Board of Commissioners selected by itself?

It is not proposed in this argument, to dispute the proposition, that under the constitutional grant of legislative power in Delaware, the General Assembly is, in the absence of any express or implied constitutional restriction, clothed with plenary power for all purposes of civil government.

Nor is it claimed, that the Water Commission Act should be declared unconstitutional, merely because it may seem opposed to the spirit of the Constitution, or to violate what are generally held to be the fundamental principles of a republican form of government, or because it is unjust or tyrannical.

But is there not to be found some provision in the Constitution of the United States, or in that of this State, which will protect the Mayor and Council of Wilmington in its rights of property, and secure to it the enjoyment of the same?

If so, the Water Commission act clearly cannot be sustained as a valid exercise of the police power of the State.

That power is based upon the maxim, *sic utere tuo ut alienum non laedas*, and its legitimate exercise, save in cases of necessity, extends only to the regulation, and not to the prevention, of the use by the owner of his property.

Cooley's Constit. Lim., *577; *People v. Jackson & Mich. Plank Road Co.*, 9 Mich., 307; quoted in text of *Cooley's Constit. Lim.*, *578.

The property connected with the Water Department is subject to the police power of the State to no greater extent than it would be, if owned and controlled by a private corporation or a natural person.

The prohibition in the U. S. Constitution against the passage of laws impairing the obligation of contracts applies as well to executed, as to executory contracts.

Cooley's Constit., Lim., *275.

The Constitution of Delaware suffers no person to be deprived of his property, unless by the judgment of his peers or the law of the land; and this constitutional safeguard equally protects artificial and natural persons.

The words "the law of the land" do not mean a statute passed for the purpose of working the wrong complained of, but are equivalent to the phrase "due process of law."

Taylor v. Porter, 4 Hill, 140; *Cooley's Constit., Lim.*, *353, *354, 351.

Vested rights of property, embracing not only the title to property, but also rights of enjoyment and control thereof, are within the protection of our State constitution.

"The legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the Federal and State constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative."

Newland v. Marsh, 19 Ill., 382; *Cooley's Constit. Lim.*, *91.

"The right of every man to do what he will with his own, "not interfering with the reciprocal right of others, is accepted "among the fundamentals of our law."

*Cooley, Constit. Lim., *385.*

It is submitted, that the Water Commission Act is forbidden

by both the Federal and State constitutions; but if not by both, certainly by the latter.

It is of the utmost importance to distinguish between the legislative power over the private franchises of a city on the one hand, and on the other over the rights of property acquired by the city in connection with the exercise of those franchises.

With respect to the latter, the corporation is protected in their enjoyment by the same constitutional guarantees which would protect a private corporation.

It has purchased and paid for a large amount of real and personal property, used in connection with the Water Department, and as to this property it has already been shown that the corporation is *quasi*-private.

It becomes important to distinguish between the power of the legislature over property acquired by the municipality to answer State ends, and property as to which the municipality is a *quasi*-private owner.

It might with some reason be claimed that property acquired by a municipal corporation proper, as a mere State agency, is acquired for and on behalf of the State, and is, therefore, subject to the absolute control and disposition of the legislature.

But the authorities do not go even to this extent.

Cooley, Constit., Lim., *277.

There is no reason why the legislature should possess such control over the private property of a municipal corporation proper, during its existence.

The State of Delaware, in its sovereign capacity, has no business or concern with the property belonging to the Water Department.

That property was paid for by the citizens of Wilmington, and not by the State of Delaware.

It is used for the private purposes of the Mayor and Council of Wilmington, and was not acquired to answer State ends.

The inhabitants of the city enjoy the property, and the citizens elsewhere have no interest in it.

It is, therefore, property belonging to the city, in contradistinction to property belonging to the State, and the city cannot

constitutionally be deprived by the legislature of the use and enjoyment of it.

But against the will of a municipal corporation proper, to deprive it of the management and control of property belonging to its Water Department and vest the same in a board of officers appointed by the State, not under official bond or subject to the authority of the corporation, is a bald violation of its constitutional rights of property.

STORY, J. in the *Dartmouth College* case, says:

"In my judgment, it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter."

Dartmouth College Case, 4 Wheat, 518, 712.

There is ample authority to show that the power of the legislature, even in the absence of any specific constitutional restriction, over the property, and especially the private property, of municipal corporations, is not unlimited; and that constitutional guarantees, relating to the rights of private property, and the inviolability of contracts, are applicable to municipal corporations proper, in their relation to the State.

Dartmouth College Case, 4 Wheat., 518, 694; *2 Kent's Com.*, *275, *306, n. b., 309; *Town of Pawlet v. Clark*, 9 Cranch, *292, 336, 337; *Montpelier v. East Montpelier*, 29 Vt., 12; *Id. v. Id.*, 27 Vt., 704; *Poultney v. Wells*, 1 Aiken (Vt.), 180; *Regents of University v. Williams*, 9 Gill & J., 365; *Trustees, &c., v. Aberdeen*, 13 Sm. & Mar., 645, 646, 648; *Louisville v. University*, 15 B. Mon., 642, 667, 672, 676, 687; *Clinton v. Cedar, &c., R. R. Co.*, 24 Iowa, 455, 475, 476; *Bowdoinham v. Richmond*, 6 Greenl., 112; *Warren v. the Mayor of Lyons City*, 22 Iowa, 351; *Grogan v. San Francisco*, 18 Cal., 590, 612, 613, 614; *Mayor, &c., of Nashville v. Towns*, 5 Sneed, 186; *Aiken v. The Western R. R. Corporation*, 20 N. Y., 370; *State v. Springfield Township*, 6 Ind., 83; *County of Richmond v. County of Lawrence*, 12 Ill., 1,

8; *Benson v. The Mayor, &c., of New York*, 10 Barb., 223, 233, 240, 244; *People v. The Mayor, &c., of New York*, 32 Barb., 102, 111, 115; *People v. Haws*, 37 Barb., 440, 453, 455; *People v. Batchellor*, 53 N. Y., 128, 138, 139, 140, 141, 142, 143, 144; *Sweet v. Hurlbert*, 51 Barb., 312; *Hampshire v. Franklin*, 16 Mass., 76; *Brunswick v. Lichfield*, 2 Greenl., 28, 33; *North Yarmouth v. Skillings*, 45 Me., 133; *Daniel v. Memphis*, 11 Humph., 582, 585; *Atkins v. Randolph*, 31 Vt., 226, 237, &c.; *Trustees, &c., v. Bradbury*, 11 Me., 118; *Hasbruck v. Milwaukee*, 13 Wis., 37, 46; *The Town of Milwaukee v. City of Milwaukee*, 12 Wis., 93, 99, 100, 101, 105, &c.; *Mills v. Charlton*, 29 Wis., 400; *State of Wisconsin v. Haben*, 22 Wis., 660, 665, 666; *Cooley's Constit. Lim.*, *238; *Cooley on Taxation*, 482, 483, 484, &c., 494; *Detroit v. Detroit & Howell P. R. Co.*, 43 Mich., 140; *Railroad Co. v. Ellerman*, 15 Otto., 166, 171, 173.

It may be noticed in passing, that the fact that the power of eminent domain may be brought into requisition for the purpose of enabling a municipal corporation proper to acquire real estate, to be used in connection with its Water Department, can no more stamp the corporation with a public character, with respect to matters relating to water supply, than the exercise of the same power in behalf of a railroad company could render it a public corporation.

People v. Salem, 20 Mich., 452; *Cooley's Constit., Lim.*, *531, n. 1.

The doctrine of local self-government in local concerns will, upon investigation, furnish the test which will determine the extent of the legislative control over the purely local concerns of municipal corporations proper.

For the existing system of local self-government must be considered in construing the constitutional guarantees relating to rights of person and property.

1 Mun. Corp., 3d Ed., § 9; *Cooley's Constit., Lim.*, *189, *190.

The doctrines of local self-government, so cherished by the Anglo-Saxon race, had their origin in the desire for the more enlarged exercise and protection of the rights of person and property, and have been fruitful in blessings to those who have been subject

to the system in its highest form of development—municipal corporations proper.

Dillon, 1 Mun. Corp., 3d Ed., § 11.

Thus it has been held in many cases, that the legislature may compel a municipal corporation proper to assume the burden of improving the streets, constructing railways, which are now considered public highways, in which the people of the State at large are interested, and expending moneys for a variety of other purposes, public in their character.

Cooley on Taxation, 475–6–7.

But here the power of the legislature ends.

Hence the legislature has not the power to compel a municipal corporation proper to assume burdens for purposes relating only to the private concerns or interests of the corporation, and not connected with the ends of State sovereignty.

Cases cited supra. Dillon, 1 Mun. Corps., 3d Ed., §§ 73, 74.

Nor has the Legislature the power to take the control and management of any of the private property of such a corporation away from it against its will, while it continues to exist, and place it in charge of officers appointed by the State.

Dartmouth College Case, 4 Wheat, *578, *694, *712; *Atkins v. Randolph*, 31 Vt., 226; *Bailey v. The Mayor, &c., of New York*, 3 Hill, 531; *People v. Hurlbert*, 24 Mich., 44; *People v. Chicago*, 51 Ill., 17; *People v. Solomon*, 51 Ill., 37; *People v. Chicago*, 51 Ill., 58; *Attorney-General v Lothrop*, 24 Mich., 235; *People v. Detroit*, 28 Mich., 228.

Were the law otherwise, the doctrine of local self-government in local concerns would have lost its vitality.

But there is another insuperable objection to the validity of the Water Commission Act.

As has been shown, the Act makes it the duty of the Water Commissioners, not only to "resolve upon a plan for the permanent water works best suited to the circumstances of the City of Wilmington," but also to acquire, by contract or otherwise, all such real estate as may be needed for that purpose.

It also requires the Mayor and Council of Wilmington to issue its bonds "for the purpose of defraying all the cost of acquiring real estate for reservoirs, laying pipe, purchasing and establishing engines, constructing all the works contemplated by this act, and purchasing water rights."

These provisions, upon the authorities cited, are clearly unconstitutional and void, as against the consent of the corporation; for they undertake to compel the corporation to assume burdens in relation to its purely private concerns, and to be bound by contracts, to which it is not to be a party.

Therefore, even were the other provisions of the act, considered by themselves, valid, the whole act must fall, as they are so mutually connected with, and dependent on, those which are unconstitutional and void "as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently."

Cooley's Constit., Lim., 79; *Allen v. Louisiana*, 13 Otto., 80–83.

Prior to the passage of the Water Commission act, the charter of the Mayor and Council of Wilmington made it the duty of the corporation to appropriate annually a certain sum of money from the water rents for the redemption of the city bonds issued for the repayment of moneys borrowed on account of water supply.

The Water Commission act does not require any definite amount of money to be so appropriated; although a large class of citizens, who do not pay water rent, are interested in the making of such appropriation.

The provision of the act requiring the Mayor and Council of Wilmington, after having its private property wrested from it, to pay to the Board of Water Commissioners a large sum of money annually for the privilege of using a portion of it, viz: fire-hydrants, is, to say the least, adding insult to injury, and shows beyond all question the wholly independent character of the Board, with respect to the corporation.

A municipal corporation proper, when acting merely as an agency of the State sovereignty, is properly termed public, as it is in that capacity but a branch of the State government.

So a municipal corporation proper, when acting merely in relation to its own private and local concerns, may in a certain sense be termed public; for although a quasi-private corporation, clothed with a private character in its relation to the State, it is still public in relation to its own members.

Cooley on Taxation, 494, 71, 104, 105.

Finally, if the Board of Water Commissioners should be adjudged to be entitled to the control and management of the Water Department and the property connected therewith, then the singular spectacle would be presented of an irresponsible set of officers, under no official bond, and not subject to the control of the city of Wilmington, for the acts and defaults of whose employees the city would nevertheless be resposible.

Bailey v. The Mayor, &c., of New York, 3 Hill, 531; *S. C.*, 2 Denio, 433; *Cooley's Constit. Lim.*, *249.

Benjamin Nields, for the plaintiff in error:

THE ERECTION OF THE TOWN OF WILMINGTON INTO A BOROUGH.

Freeholders and inhabitants to elect by ballot—Burgesses to have powers of Justices of the Peace.

George Thomas, Esq., Lieutenant Governor of the counties of New Castle, Kent and Sussex, upon Delaware, and province of Pennsylvania, by Letters Patent, under the great seal of the said government, bearing date the 16th day of November, A. D. 1739, did erect the Town of Wilmington into a Borough, with privilege to the *freeholders and inhabitants* thereof annually to meet at the time and place in the said letters patent mentioned, and *elect by ballot* two able men, inhabitants of the said borough, to be Burgess, one to be High Constable, one to be Town Clerk and six to be assistants, for assisting the Burgesses in the management of the affairs of the said borough and for keeping the peace in the said borough, and did thereby grant and declare that the Burgess first chosen, or having a majority of votes should be called Chief Burgess of the said borough, and that the Burgesses so from time to time to be chosen, taking the qualification in the said letters patent

directed and enjoined were thereby authorized and empowered to be conservators of the peace within the said borough x to do and perform all and singular the matters and things within the said borough, as fully and effectually to all intents and purposes, as *Justices of the Peace* in their respective counties could or might lawfully do.

Laws of Del., Vol. 1, p. 482.

An Act for the better regulation of public streets, party walls and laying the foundations of buildings in the borough of Wilmington, Passed June 13, 1772.

Laws of Del., Vol. 1, p. 482.

AN ACT FOR THE BETTER REGULATION OF THE BOROUGH OF WILMINGTON.

Laws of Del., Vol. 3, p. 53, 1799.

Wells and pumps to become the property of the corporation, upon agreement with the owners.

SEC. 3. That the corporation of the said borough are hereby further empowered, when they shall think proper to agree with the owner or owners of all or any of such pump or pumps and wells as are already fixed in the streets and alleys of the said borough, which pump or pumps and wells, after such agreement made with the owner or owners thereof, shall forever after become the property of and belong to the said corporation; to be maintained and kept in repairs at the public charge.

AN ACT TO ALTER AND RE-ESTABLISH THE CHARTER OF THE BOROUGH OF WILMINGTON, PASSED JANUARY 31, 1809.

Laws of Del., Vol. 4, p. 275.

Prescribed who shall have the right to vote, &c.

The officers of the borough.

Powers of the corporation.

Borough council to constitute the legislative body.

See Act to incorporate the Wilmington Spring Water Company, passed January 23, 1804, Del. Laws, Vol. 3, p. 331.

CONSTITUTION OF THE STATE OF DELAWARE OF 1831.

Art. 7. Sec. 8. The rights, privileges, immunities and estates of religious societies and corporate bodies shall remain as if the Constitution of this State had not been altered.

Art. 7. Sec. 9. All the laws of this State existing at the time of making this Constitution and not inconsistent with it, shall remain in force unless they shall be altered by future law.

Art. 3. Sec. 8. He (the Governor) shall appoint all officers whose offices are established by this Constitution, or shall be established by law, and whose appointments are not herein otherwise provided for.

The same provisions are contained in the Constitution of 1792.

"A Corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality."

Trustees of Dartmouth College v. Woodward, 4 Wheaton, 518.

All Corporations are created in theory for the benefit of the general public,—for the public good.

Trustees of Dartmouth College v. Woodward, 4 Wheaton, 518.

The Legislature of a State may incorporate the inhabitants of a portion of its territory and confer upon them powers of local government; that is, power under and subject to the laws of the State to govern themselves and the property of a public kind, within such territory, by such rules and ordinances, as the Corporation may deem proper to enact.

Corporations of this character are *instruments* of the State, and are, such as counties, villages, towns, boroughs and cities. A portion of the power of the Legislature is delegated to them, to be exercised for the public, which power may, at any time, subject to constitutional limitation, be modified or taken away. Such corporations are public.

The legislature may also incorporate and confer upon individuals the right and power to construct canals, railways or turnpikes, or to supply a city, town or borough with light by electricity, or gas, or to supply a city, town or borough with ice, heat or water, whilst the powers thus granted are presumed to be for the benefit of the public and in consideration that the public will be benefitted by the exercise of them; such corporations are private, and are in no respect public corporations. The corporators must apply for the charter; accept its provisions when enacted by the Legislature, and act under it. It then becomes a contract between the State and corporation, and the powers conferred cannot be modified or taken away by the legislature without cause.

In private Corporations, such as have been spoken of, created for commercial or manufacturing purposes, the property and subjects over which it exercises its powers are usually called into existence after the Corporation is created.

In public or Municipal Corporations the act of incorporation does not change the character of the institutions, or transfer to the government any new power over them.

Public corporations may be empowered to take or hold private property for municipal uses, and such property is invested with the security of other private rights; so corporate franchises attached to public corporations are legal estates coupled with an interest, and are protected as private property.

2 Kent, 275–306.

A municipal corporation possesses two classes of powers, and *two* classes of *rights*—public and private. In all that relates to one class it is merely the agent of the State and subject to its control. In the other, it is the agent of the inhabitants of the place. The corporators maintain the character of individuals and is not subject to the absolute control of the legislature its creator. Among the latter class is the right to acquire, hold and dispose of property, to sue and be sued just as certain rights are conferred on private corporators and persons not *sui juris*, such as minors and married women, but are not, afterwards, as long as they exist under legislative control.

1. Dillon, 3d Ed., on Corporations, Sec. (39.) 56–67; *People v. Balchellor*, 53 N. Y., 128–138.

The Act of 1739 erecting the town of Wilmington into a borough and the several acts thereafter relating to it as a borough and afterwards as a city, conferred upon this Municipal Corporation, certain public powers among which were regulating and keeping in repair the public highways or streets; regulating the erection of buildings: of preserving the peace; protecting the lives health and property of the inhabitants; in levying and collecting taxes necessary to defray the expense of carrying out these objects, and in the exercise of these powers the corporation, acting through its officers, was simply the instrument, or agent of the State.

The legislative power over the persons and property within the city of Wilmington is absolute excepting wherein it is prohibited by the Constitution of the United States and limited by the Constitution of this State.

But the Legislature has power to confer upon the Corporation of Wilmington powers which are not governmental, powers which may be, and are, exercised by individuals and are in no way connected with the political government of the City. The Legislature might lawfully confer upon the Corporation of Wilmington the right to manufacture and sell gas, or to manufacture and sell any other commodity. To engage in Commerce or to supply the inhabitants of the City with coal, ice or water, and in the exercise of these powers the Corporation would be no more a State instrument than a natural person exercising the same powers would be. And herein lies the distinction between the Corporation acting as the Agent of the State for the purposes of the State, and its action as a private Corporation.

The Corporation of Wilmington is empowered to supply the citizens of Wilmington with good and wholesome water, and to assess and receive a tax therefor, and to lay water pipes in the streets and elsewhere in the City, for the purpose of conducting water into dwelling houses and other buildings in the City. The powers exercised by the City over the Water Works, are no more of a political power, or character, than are the powers exercised by the Wilmington Coal Gas Co. over their works, and in so far as the Corporation of Wilmington acts upon the subject matter of the Water Works, it acts no more for or in behalf of the State than does the Coal Gas Co.

Bailey v. the Mayor, &c., of the City of New York, 3 Hill, 531; *Western Savings Fund Society v. the City of Philadelphia*, 31 Penna. St. R., 185; *Board of Port Commissioners v. Common Council of Detroit*, 28 Mich., 228; *Small v. Danville*, 51 Me., 362; *Philadelphia v. Fox*, 64 Penna., 180; *Western College v. Cleveland*, 12 Ohio, N. S., 375; *San Francisco Gas Co. v. San Francisco*, 9 Cal., 458; *Oliver v. Worcester*, 102 Mass., 499; *1. Dillon on Municipal Corporation*, Sec. 39.

"A Municipal Corporation may own property to and over "which the Legislature has, while said Corporation exists, no right "or control in opposition to or independently of the will or con-"sent of the Corporation."

New Orleans, &c., R. R. Co. v. City of New Orleans, 26 La., 478; *Grogan v. San Francisco*, 18 Cal., 590; *Benson v. the Mayor, &c.*, 10 Barbour, 223; *Milwaukee v. Milwaukee*, 12 Wisconsin, 93; *Aldrich v. Tripp*, XI R. Island, 141; *Meriwether v. Garrett*, 102 U. S., 521; *U. S. v. Railroad Co.*, 17 Wall., p. 334.

THE ACT OF THE GENERAL ASSEMBLY CREATING A BOARD OF WATER COMMISSIONERS FOR THE CITY OF WILMINGTON IS UNCONSTITUTIONAL AND VOID.

The Act of the General Assembly, passed April 18, 1883, creating a Board of Water Commissions for the City of Wilmington, and appointing William T. Porter, Cæsar A. Rodney and Lewis Paynter, the members of said Board takes away from the officers constituted and appointed by the Corporation the entire control of all matters relating to water supply in the City of Wilmington, and the management and direction of the water works, now existing, or hereafter to be constructed in connection therewith, and all books, accounts, and property connected with the Water Department of said city, or any officer therein, and places the control thereof in the hands of the said commissioners appointed, as above stated, by the Legislature of the State. By this Act the charter of the City of Wilmington is altered in a material respect, whereby private rights, and the control of private property of the Corporation are taken from it without its consent, and with-

out compensation; is an act impairing the obligation of the charter, and is unconstitutional and void.

The Governor shall appoint all officers whose offices are established by this Constitution, or shall be established by law, and whose appointments are not herein otherwise provided for; Art. 3, Sec. 8.

The right to acquire, hold and dispose of real and personal property for purposes not connected with the State is a contract. "It is a contract for the security and disposition of property." It is a contract on the faith of which, real and personal estate has been conveyed to the Corporation. It is, then, a contract within the letter of the Constitution, and within its spirit also.

Dartmouth College v. Woodward, 4 Wheaton, 518; *P., W. & B. R. R. Co., v. Bowers*, 4 Houston, 506.

Municipal powers may be changed by the Legislature, if vested rights, acquired thereunder, are saved.

Blanding v. Burr, 13 Col., 343; *Davidson v. Mayor of N. Y.*, 27 How. (N. Y.) Pr., 343.

The Legislature cannot divest a municipal corporation, without its consent, of property legally acquired by it.

Mayor v. Steamboat Co., R. M. Charlt. (Ga.), 342; *People, et rel., Townsend v. Potter*, 26 Hun., 622; *Bolton v. Albertson*, 55 N. Y., 50.

The Water Works which the corporation of Wilmington has acquired and holds, consist of lands, water-rights, engines, water-pipes extending throughout the city, fire plugs, tools and other personal property, amounting in value to many thousands of dollars. The purpose of these works is to supply the citizens with good and wholesome water, but these Water Works are not public property; the public at large have no interest in them; the inhabitants of Wilmington have no right to the use of these works, or the use of the water without paying for it, any more than they have the right to the use of the gas of the Wilmington Coal Gas Co., or the use of the sand without paying for it, neither are the inhabitants required to use the water or to pay for it, if they do not use

it. They can obtain water from cisterns, wells or other sources if they choose to do so. The Corporation is therefore engaged in the business of selling water to such of the citizens as may choose to purchase it.

Municipal corporations are created solely for purposes of local government. They are depositories of a portion of the political power of the State, which they exercise not as a private franchise but as a public trust, as the mere agents or trustees of the Legislature, subject to its supervision and control. Such a charter is not in any proper sense a contract, *inter partes*, within the prohibitory clause of the Constitution. It is, therefore, revocable, and is subject to alteration at the pleasure of the Legislature, "*saving any private rights and interests which may have previously become vested under the action of the corporate body.*"

4 Houston, 506; *Bailey v. Railroad Co.*, 4 Harr., 389–396; *Weed v. Borough of Greenwich*, 45 Conn., 20 N. J., Eq., (5 C. E.) 350.

THE ACT FURTHER IMPAIRS THE OBLIGATION OF CONTRACTS BETWEEN THE CORPORATION OF THE CITY OF WILMINGTON AND THE HOLDERS OF CERTAIN BONDS ISSUED BY THE CITY OF WILMINGTON.

By an Act of the Legislature passed April 8, 1873, the Mayor and Council of Wilmington were authorized to borrow a sum of money not exceeding $200,000 to be applied for a new Water Reservior and for improving the Water Works of said City, &c., and Sec. 3 of said Act provides that "For the redemption of the debt contracted under said Act there should be a sinking fund of $6000.00 applied every year until the whole debt should be paid. To constitute said sinking fund the City Treasurer should set apart and appropriate to that purpose, $6000.00 that should come to his hands from the Water Rents for the year, until the sinking fund should be fully made up. Under this Act the City Council of Wilmington, by an ordinance passed July 30, 1874, authorized bonds to be issued to the aggregate amount of $200,000 and provided for their payment as set forth in said Act.

And by another Act passed March 1, 1875, the Mayor and Council were further authorized in like manner to borrow a sum of

money not exceeding in the aggregate $125,000 to be applied to the same objects and purposes, and this Act provides for the redemption of the debt by creating a sinking fund of $3,500.00, each year from water-rents for the year, until the whole of such debt should be paid from money that should come into the hands of the City Treasurer from water-rents for the year, and in default of such, then from any other funds of the City, in the treasury unapplied, and further provided that such fund should stand pledged and be applicable to the redemption of said funded debt, and should be used for no other purpose whatever.

And under this Act the City Council, by an ordinance passed May 7, 1875, authorized bonds to be issued to the aggregate amount of $125,000 and provided for their payment as set forth in said Act.

These Acts of the Legislature and ordinances provided, that the sinking fund thereby to be created from the water rents was to be the fund out of, and from which, these bonds were primarily to be paid. Such was the law at the time the bonds were issued and that law entered into, and necessarily formed a part of the contract.

"It is a rule in the construction of contracts that the law ex-
"isting when a contract is made enters into it and necessarily
"forms a part of it."

Western Savings Fund Society v. City of Philadelphia, 31 Penna., 175; *Bronson v. Kenzie*, 1 Howard, 628.

This Act no where requires, directs, authorizes or permits the Board of Water Commissioners to set apart and appropriate any part of the revenues derived from the Water Works for the purpose of creating a Sinking Fund to pay the Water Bonds as provided in the Acts and Ordinances, authorizing the City to issue them, and the Act takes from the City Treasurer the power to set apart and appropriate any of the revenue for that purpose. The fact that in the law authorizing the City to issue the Bonds, it is provided that if the Sinking Fund should fail by reason of insufficient money coming into the hands of the City Treasurer from water rents for the year, that then the Bonds should be paid from any other funds of the City in the Treasury unapplied, does not warrant the Legislature by a subsequent Act to take away such

Sinking Fund or to direct the application of money received from the Water Works to other purposes and in a different manner than as set forth in the Acts.

The Acts secured to the Bond-holders two funds out of which they were to be paid.

1. The Sinking Fund which was primarily the fund out of which they were to be paid.

2. Any other funds of the City in the Treasury unapplied which was in the alternative, conditional and uncertain.

The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon *the extent* of the change which the law effects in it. *Any* deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation:—

Green v. Biddle, 8 Wheaton, 84; *Western Savings Fund Society v. City of Philadelphia*, 31 Pa., 175.

THE ACT INVADES THE RIGHTS OF THE CORPORATION SAVED AND SECURED TO IT BY THE CONSTITUTION OF 1792—AND 1831.

The town of Wilmington was erected into a borough and made a body politic with corporate powers, before any Constitution for the State of Delaware was adopted, and all of the rights, privileges, immunities and estates, of the corporation granted in the original charter of 1739, and in the amendment thereof by the Act of 1772, were secured and expressly saved by the 9th Section of the 8th Article of the Constitution of 1792. After the adoption of this Section of the Constitution, the Legislature had undoubtedly the power to enlarge, extend and add to the rights, privileges, immunities and estates of the Corporations, subsisting at the time the Constitution was adopted, but it did not, thereafter, have the power, to diminish, or take from the Corporation any of its franchises, for the reason, the Constitution provided that they should thereafter remain, as if the Constitution had not been altered.

And the Legislature did thereafter add to and increase and enlarge the rights, powers and privileges of the Corporation of Wilmington by the act of 1799 and the act of 1809.

By the act of 1809 all of the officers and agencies necessary to carry into effect the powers granted the corporation were provided for, and their duties defined. The executive power, under Section 10 of the act, was vested in the burgesses, who were constituted conservators of the peace and authorized and required to do all things in the borough, which *justices of the peace* for the said County of New Castle could lawfully do.

The Legislative power over the concerns of the corporation was, under Sec. 11 of the Act, vested in the Borough Council, as therein constituted, and the subjects over which the Borough Council was given power to legislate were enumerated. It had power to enact ordinances, among other things, to preserve health, prevent the introduction of infectious or contagious diseases, to define and remove nuisances; for draining docks and regulating wharves; to erect market houses, and to regulate markets, *to erect pumps or any other apparatus for supplying the citizens with good and wholesome water, to repair and amend the* same, and to assess and receive a tax therefor.

The rights, privileges, immunities and estates of the corporation of the City of Wilmington, which existed before, and at the time of the adoption of the amending Constitution of 1831, were:

1. *The right* of the free white male citizens of this State of the age of twenty-one years and upwards residing within the borough, assessed for and having paid a borough tax, to elect *annually by ballot* the Burgesses, *members of Council*,—the right of Corporation of Wilmington to elect its own officers.

2. *The right* of the Council, elected as aforesaid, to enact ordinances for the erection of pumps, or any other apparatus for supplying the citizens with good and wholesome water, to repair and amend the same and to assess and receive a tax therefor.

3. *The right* of said Burgesses, elected as aforesaid, to be conservators of the peace and to do and execute all things in the said borough, which Justices of the Peace for the County of New Castle might lawfully do.

With respect to the Water Works of the borough, there was:

a. The right in the Corporation to acquire and hold real and personal property necessary for the works.

b. The right of the Council to the control of all matters relating to the water supply and of the management of the Water Works.

c. The right of the qualified voters within the corporation to elect by ballot the agents who should have the control of the matters relating to the water supply and of the management of the Water Works.

These rights were subsisting and were being enjoyed by the qualified voters of the corporation and by the officers and agents elected as aforesaid by the qualified voters at the time of the adoption of the amended Constitution of 1831, and by the 8th section of the 7th article of that Constitution all "The rights, privileges, immunities and estates of religious societies and corporate bodies shall remain as if the Constitution of this State had not been altered." The Legislature was thereby prohibited from invading any of the rights, liberties and franchises lawfully held and enjoyed by the corporation of Wilmington at the time this Constitution was adopted. The right of corporation to elect the officers and agents who have charge of the Water Works *is a vested right* of the corporation.

State v. Wilmington City Council, 3 Harrington, p. 301.

The Legislature thereafter undoubtedly had the power to add to and enlarge the powers and rights of the corporation, but it did not thereafter have the power to invade or take from the corporation any of the rights, &c., which the Constitution provides should *remain.* The right that thereby remained, remained by virtue of that constitutional provision, and not by virtue of any previous legislative grant.

Gray v. The State of Delaware, 2 Harr. 76.

The Legislature has invaded the rights of the Corporation, by attempting to take from it the *control and management* of its private property, and placing the control and management thereof in the hands of agents appointed by the Legislature.

Therefore the Legislature has not the power to take from the City of Wilmington the control of its Water Works, the same

being private property, and place the same in the hands of agents appointed by the Legislature.

Pumpelly v. Green Bay Company, 13 Wall., 166; *Hooker v. New Haven and N. H. C.*, 14 Conn., 146.

W. C. Spruance, on same side.

Ignatius C. Grubb, for defendants in error:

Mandamus will lie to enforce the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law, where the law furnishes no other adequate specific remedy.

High Ex. Rem., Sec. 1.

"By the Constitution of this State and the Statute law the Superior Court is invested with full power to award the writ to compel the performance of a *public* duty in *all* cases appropriate for its exercise."

State ex rel. Ziba Ferris v. Knight et al. (Delaware); *Comm'rs of Knox Co. v. Aspinwall*, 24 How., 383.

It is a general rule that mandamus lies to compel the transfer or delivery of the books, seals, records, papers and other *paraphernalia* pertaining to a *public office* to the person properly entitled to their custody, and the writ may even be extended to the case of public buildings pertaining to an office, and may require the surrender of such buildings to the person legally entitled thereto.

High Ex. Rem., Sec. 73 and cases cited.

Whenever the term of an officer has expired he may be compelled by mandamus to turn over to his successor all records and books pertaining to his office to which the public are entitled to access.

High, Sec. 74 and note 3; *Rex v. Clapham*, 1 Wils., 305; *People v. Head*, 25 Ill., 325; *High*, Sec. 74 and note 5; *People v. Killduff*, 15 Ill., 492; *High*, Sec. 76 and note 5; *State v. Layton*, 4 Dutch., 244, 250, 254; *Burr v. Norton*, 25 Conn., 103, 113; *High*, Sec. 74; *People v. Head*, 25 Ill., 325; *High*, Sec. 75; *Crowell v. Lambert*, 10 Minn., 369.

Here the real question is whether the General Assembly has the power to appoint and authorize the Board of Water Commissioners at pleasure to terminate David H. Coyle's term of office

and appoint Henry B. McIntire in his stead, and to require Coyle to surrender and deliver to McIntire the books, accounts and property connected with the Water Deportment in obedience to their direction, so that said Board may properly perform the duties imposed by law and the public have the benefits thereof.

The real issue is not whether Mr. Coyle has a title, but whether the Board can require him—title or no title—to recognize its authority and obey its directions under the Act of April 18, 1883.

Section 5 of said Act provides as follows:

1. That *all officers* of the Water Department shall be, from its organization, under and subject to the *control* of said Board.

2. That their terms of office shall be subject to termination at the pleasure of said Board.

3. That all books, accounts and property connected with the Water Department of the City or any office therein, shall be used and *disposed* of according to the *directions* of said Board.

Section 6 of said Act of April 18, 1883, provides as follows:

1. That said Board shall, at its discretion, appoint, employ and discharge all officers, agents, ministers and servants, necessary for the management and service of the Water Works, etc.

2. And make all needful rules and regulations for the observance of the officers, agents, ministers and servants by it employed, etc.

Del. Laws, Vol. XVII, p. 410–11.

Under these two sections the Board have assumed to terminate the official term of Chief Engineer Coyle, and to appoint H. B. McIntire, Chief Engineer in his place and stead. Mr. McIntire has accepted the appointment, been duly qualified for, and entered upon his duties.

Pursuant to the legislative authority conferred by Sec. V, the Board has directed Mr. Coyle to surrender the books, accounts and property to Chief Engineer McIntire, and the latter has made of the former a formal demand for the same, which he has refused to comply with.

Section IV of the Act of April 18, 1883, gives the Board "control of all matters relating to water supply in the City of Wilmington, of the management and direction of the Water

Works now existing, or hereafter to be constructed in connection therewith, and charge and supervision of all the mains, stopcocks, fire hydrants and other fixtures appertaining to the distribution of water through the City," etc.

As Mandamus may be awarded to compel the performance of a public duty it may issue against Mr. Coyle in this case.

Mandamus will lie at the instance of the officers especially charged with a public duty and representing the public interests, for the enforcement of a public right.

High Ex. Rem., Secs. 432, 33 and note citations; *Heffner v. Commrs.*, 28 Pa. St., 108, 114.

It will also lie upon application of even any citizen to enforce a public, as distinguished from a private, right.

High Ex. Rem., Secs. 431–34 and notes.

A Board charged with enforcement of a public right and the performance of public duties may be relators in mandamus.

State ex rel. v. City of Cincinnati, 19 Ohio, 178; *State v. Heben*, 22 Wis., 660,; *Kimball v. Lamprey*, 19 N. H., 215, 221–22; *People v. Throop*, 12 Wendell, 183.

Where an alternative writ is necessary it may, in Delaware, be issued in a clear case presented by the petition (and without a preliminary rule to show cause.)

Union Church v. Sanders, 1 Houst., 134; *High Ex. Rem.*, Secs. 502, 3, 4.

A rule to show cause may properly take the place of the alternative writ, for the purpose of laying the foundation for granting a peremptory mandamus.

High, Ex. Rem., Sec. 553; *State ex rel. Ferris v. Knight et al.* (Delaware.)

Where a plain imperative duty is incumbent by law, upon public officers, and the facts are not disputed, the court will not require the parties to go through the form of an alternative mandamus, where they have been notified and have had the opportunity to appear and be heard by counsel, and the Court is fully satisfied as to the *legal duty*.

High, Ex. Rem., Sec. 552–553; *People v. Pearson*, 1 Scam., 458; *Commrs. of Knox Co. v. Aspinwall*, 24 How., 376, 385; *Exparte Rogers*, 7 Cowen, 546; *Exparte Goodill*, 14 Johns.,

325; *State v. Layton*, 4 Dutcher, 244, 250, 254; *State v. Mayor, etc.*, 6 Vroom. (N. J. L.), 196; *State ex. rel. Ferris v. Knight et al.* (Delaware); *Kimball et al. v. Lamprey*, 19 N. H., 221–22; *People v. Throop*, 12 Wend., 183; *People v. Brennan*, 39 Barb., 522, 539; *People v. Ass'ors of Barton*, 44 Barb., 148, 161.

Where, in disposing of the application upon the answer to the rule to show cause, the court regards the answer as a return to an alternative mandamus, the effect of moving for the peremptory writ upon the pleadings is to admit the truth of the matters of fact contained in the answer.

High, Ex. Rem., Sec. 554; *Exparte Newman*, 14 Wallace, 166.

Where the return is in itself nothing more than a demurrer, and raises no questions of fact, but merely presents questions of law, no demurrer thereto is necessary. Thus, where the return traverses no fact alleged, and confesses none except the refusal of the respondent to perform the act required, and alleges in justification of his refusal the unconstitutionality of the law requiring its performance, the whole question involved is fully presented, either with or without a demurrer to the return. And in such case the court, upon being satisfied of the constitutionality of the law, will grant the peremptory mandamus.

High, Extr. Rem., Sec. 492; *People v. Salomon*, 46 Ill., 336; *People v. Miner*, 46 Ill., 387.

Where the situation is serious and urgent the rule should be returnable at the earliest possible day.

State ex. rel. Ferris v. Knight et al. (Delaware.)

The said Act expressly declares and creates the "Board of Water Commissioners" to be an "agent" of the City of Wilmington, *i. e.*, a separate department and an integral and constituent part of the Corporation—as much so as the Mayor or City Council.

See Section I especially; also Sec. IV.

At the expiration of the term of each Commissioner appointed by said Act the Mayor shall appoint his successor for the term of six years, and biennially thereafter. Any member of said Board may be removed for cause by the Mayor with the concurrence of two-thirds of the whole City Council.

See Sec. II.

In the new City Charter passed April 13, 1883, to "revise

and consolidate the statutes relating to the City of Wilmington," the General Assembly expressly avoided conferring upon Council any power to supply water to the City and its inhabitants, by striking out the long existing provision therefor; by giving Council only such general powers "as shall not be in contravention of any existing laws of this State," (Sec. 31), and by repealing all acts or parts of acts manifestly superseded, etc., etc., by said Charter. (Vol. 17, p. 436, 492.)

This marked omission clearly was designed with the purpose of supplying it by the act of April 18, 1883, creating the Water Commission which was intended to supersede the previous control of the water supply by the Council.

The said act confers authority on the Board for two general purposes:

The first, to have the care and control of the *existing* City Water properties with a view to the *present* supply.

The second to *enlarge* and *extend* the present City Water properties with a view to the *future* supply of its people.

Even if (which is not conceded) the Act were in some parts *invalid* for constitutional or other reasons, and therefore inoperative or ineffective for the second purpose, it clearly is not so in respect to the first general purpose.

Therefore so much of it must stand and be executed.

Bailey v. R. R. Co., 4 Harring., p. 404; *People v. Walsh*, 96 Ill., p. 254–5; *People v. Hurlburt*, 24 Mich., p. 73.

To be invalid, "an Act must be shown to be void in so many "or such important particulars that the main general purposes "could not be carried into effect without the aid of these objec- "tionable provisions."

People v. Hurlburt, 24 Mich., 73; *Cooley Constit. Lim.*, 5 Ed., pp. 201–15 (177.)

The City of Wilmington is a Municipal Corporation created by and existing under the legislative authority of the State. As such it is an instrumentality of the State to aid the State in the local government of that portion of its people. Its powers and duties are distributed and assigned by the legislature to be exercised as it has prescribed by the respective corporate agents designated or authorized by the General Assembly.

Thus the mayor is one of such agents; the Council another and the Board of Water Commissioners in question is also expressly, in the very first section of the Act under discussion, declared to be one of the corporate agents.

Certain powers and duties, heretofore exercised by the Council as the designated agent for the supply of water to the citizens, have been withdrawn from Council and transferred to the Board.

The Water Works and other property belonging to said corporation, for water supply purposes, have been procured by voluntary conveyance, or else through the exercise of the power of condemnation, to be paid for, in either case, wholly by money raised through the exercise of the taxing power. They have consequently been obtained exclusively for a public and not a private purpose, for the public benefit and not for private emolument. They are essential to preserve the public health without, by preventing epidemics within the City; and to prevent increased taxation beyond, by preserving from fire taxable property inside its limits.

Being so, the authority to procure, hold and manage the same was granted by the Legislative power for a public purpose not of merely local and municipal concern, but of general concern, as well to the people of the State outside, as inside the municipality.

The title to said property remains in the City and it is still to be used for its accustomed purpose. So that the act neither divests corporate property nor diverts its use. It merely transfers, not the property but its management from the control of one designated corporate agent and legislative instrumentality to that of another upon whom it confers all the power and imposes all the duties necessary to accomplish the purposes for which said property has been procured by the City.

Has the legislature the lawful authority to do this?

By the Revolution, the duties as well as the powers of government devolved on the people of Delaware.

It is admitted that among the latter was comprehended the transcendent power of Parliament.

Dartmouth College v. Woodward, 4 Wheaton, 651.

The legislative power of this State is vested in the General Assembly. (Section 1, Art. 2, Constitution of Delaware.)

The people of Delaware, after the Revolution, in framing their Constitution, committed to the General Assembly all the legislative powers which the Parliament of Great Britain had wielded, to be exercised subject only to such restrictions, expressed or implied, as were contained in said Constitution.

But from the time of the adoption of the Constitution of the United States, this power was to be exercised subject also to such limitations as might be imposed by that instrument.

Plenary power in the Legislature for *all purposes* of *civil government* is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden, either expressly, or by necessary implication; but independently of these restraints, expressed or implied, *every subject* within the scope of *civil government* is liable to be dealt with by the Legislature.

Cooley Const. Lim., 5 Ed., pp. 105–108 (87–90), 206 (173.); *People v. Draper*, 15 N. Y., 532, 543; *Thorpe v. Rutland & Bur. R. R. Co.*, 27 Vt., 140, 142; *Wynehamer v. People*, 13 N. Y., 378, 391; *Dartmouth College v. Woodward*, 4 Wheaton, 651.

Hence, subject to such constitutional restraints, the power of the General Assembly is supreme for all purposes of civil government, and it may make such provision, from time to time, as, according to its own judgment, will best serve the public interest, convenience and necessity, and promote and protect the general welfare.

If this power be supreme over all the people of the entire State of Delaware, it must be equally so, since the greater includes the less, over that portion of the people residing in any particular locality thereof.

In the absence of Federal or State constitutional restriction, the Legislature, at its mere will and pleasure, without the consent, and even against the will of the Municipal Corporation, may create or destroy its entire corporate existence and all its corporate agencies, and may also enlarge, diminish or transfer all its civil, political or governmental powers; which legislative authority necessarily includes and implies the power to substitute new or

other corporate agents to discharge the powers and duties formerly exercised by others.

Dillon Mun. Cor., Sec. 37, [17]-27-44 [23]-45 [24]; *Dillon Mun. Cor.*, Sec. 54-[30] note 2, 64 (37) 65, 66; *Dillon Mun. Cor.*, 3d Ed., Sec. 67, note 2, 68, *Cooley Const. Lim.*, 5 Ed., 140, 229-32, 334; *Darlington v. Mayor of New York*, 31 N. Y., 164, *U. S. v. Railroad Co.*, 17 Wall., 328-9; *Barnes v. Dist. of Columbia*, 91 U. S., 540, 544, 545-6; *Mt. Pleasant v. Beckwith*, 100 U. S., 514, 529, 531-2-3-4; *Meriwether v. Garrett*, [Memphis Case] 102 U. S., 472, 503-4-5-6, 511; *Struthers v. Phila.*, 4 Weekly Notes Cases, 379; *People v. Hurlburt*, 24 Mich., pp. 67, 69-70, per Christiancy J.; *People v. Hurlburt*, 24 Mich., pp. 84, 111; *People v. Morris*, 13 Wend., 329, 333; *Philadelphia v.Fox*, 64 Pa. St., 169, 180, 182-3; *New Orleans v. Morris*, 105 U. S., 600, 602, 603; *Comco v. Thompson*, 81 Pa., St. 314.

Municipal property is subject to legislative control and authority, especially where purchased with money raised by taxation. (Though it has been, in some instances, held that it may not be destroyed, or divested or diverted to other than uses of the corporation, or those for which it was obtained.)

Dillon, M. Corp., Sec. 66, 67, 68, (40) (Notes Sec. 68); *Darlington v. Mayor*, 31 N. Y., p. 164, 193, 205; *Commissioners, &c. v. Lucas*, 93 U. S., 114-15; *People v. Hurlburt*, 24 Mich., 79, 105; *Cooley Const. Lim.*, 5th Ed., p. 292-95, (238).

Water Works property is a public necessity and is held for a public and not private use, by a city.

New Orleans v. Morris, 105 U. S., 600, 602, 3; *Darlington v. Mayor of New York*, 31 N. Y., p. 204; *Foster v. Fowler*, 60 Pa., St. p. 27, 31-32; *Dillon M. Corp.*, Sec. 73.

Public property and subordinate rights of a Municipal Corporation are within the control of the legislature.

Mt. Pleasant v. Beckwith, 100 U. S., 532; *Meriwether v. Garrett*, 102 U. S., 513.

Water Works property, like other public property of the corporation, especially when procured by the exercise of the power of taxation or condemnation, and the power to hold and control it, are taken subject to the obligation that it shall be used so as best to accomplish the object of the legislative grant of such power, and

subject to being regulated, withdrawn or transferred in the discretion and at the pleasure of the legislative power.

Dartmouth College Case, 4 Wheaton, 660-62; *Comm'rs, &c. v. Lucas*, 93 U. S., 114, 15; *Meriwether v. Garrett*, 102 U. S., 511.

"Grants of immunity from legitimate governmental control are never to be presumed. The presumptions are all the other way," Per Chief Justice Waite, *Ruggles v. People Cent. L. J.*, Vol. 16, No. 24, p. 667, U. S. Sup. Court.

The Wilmington Water Works and other property and appurtenances connected with the Water Department of the City, are public property procured by money received by means of taxation.

Taxation is not lawful for any purpose not public.

Cooley Con. Lim., 5th Ed., 209 (175), and 627 (531.)

The first grant to Wilmington of power to provide for the water supply and the *present* water works system, was by Act of 1809, and therefore *since the Revolution*. Wherefore the Corporation accepted the power to be exercised by the Council, subject to the legislative will according to the American doctrine, and, therefore, to the condition that it might be regulated, withdrawn and transferred at pleasure by the Legislature.

Dillon M. Corp., 3d Ed., Sec. 37 (17), 65; *Dartmouth College Case*, 4 Wheaton, 651, 661; *Mt. Pleasant v. Beckwith*, 100 U. S., 531; *Meriwether v. Garrett*, 102 U. S., 511; *Commissioners, &c., v. Lucas*, 93 U. S., 114–15; *Phila. v. Fox*, 64 Pa. St., 182–3; *Mt. Pleasant v. Beckwith*, 100 U. S., 533.

CONSTITUTIONAL LIMITATIONS.

We fail to discover any in the Federal Constitution and find none in the State, though it be claimed to exist in the following clause of Sec. 8, Article VII, of our Constitution:

"The rights, privileges, immunities and estates of religious societies and corporate bodies shall remain as if the constitution of this State had not been altered."

This saving or reservation of corporate rights, &c., was first embodied in our State Constitution of 1792, and still is continued in our Constitution of 1831, which went into effect in January, 1832.

Prior to our Constitution of 1792, no power had been conferred upon the Corporation of Wilmington to provide any water supply.

In 1799 power was given to the Borough Corporation "to maintain and keep in repair pumps and wells at the *public charge*," for "*use* and *service* in extinguishing *fires* which may happen within the said Borough."

Del. Laws, Vol. 3, p. 54–5.

In 1809 the first authority was given to the corporation, providing that Council may pass ordinances to erect pumps or any other apparatus, for supplying the citizens with good and wholesome water, to repair and amend the same, and to *assess* and *receive a tax therefor*. Vol. 4, Chap. 97, Sec. 11, p. 280.

This power was continued in a general clause (Sec. 8,) of the Charter of 1832 (Vol. 8, Chap. 108, p. 99), which changed the Borough to the City of Wilmington; and was continued (with the insertion of the words "purchase or" between "to" and "erect,") in the precise words of the Act of 1809, in the Charter of 1852, Chap. 73, Sec. 27, Am. Code, 415.

There it remained until April 13, 1883, when the "Act to revise and consolidate the statutes relating to the City of Wilmington" was passed. Vol. XVII, p. 424.

This act was presented to the General Assembly, by direction of the City Council, with the precise words of the Charter of 1852, relating to the water supply, incorporated in it. This provision was stricken out by the General Assembly, and the Act passed without making therein any provision for the water supply of the City. This Act has been accepted and acted upon by the City Council as the Revised Charter of the City.

On April 18, 1883, the "Act to establish a Board of Water Commissioners for the City of Wilmington and for other purposes" was passed (Vol. XVII, p. 408), which has given rise to the present contention.

From the foregoing it will appear that, prior to the American Revolution, no right, privilege, or franchise to supply Wilmington with water had belonged to that corporation or any of its corporate agencies.

From the Revolution, as heretofore shown, the American doctrine has certainly existed in this, as well as other States, that the Legislature has authority to create or abolish, alter, modify, enlarge, restrict or control corporate powers, agents, duties, &c.

Dillon Mun. Corp., 3d Ed., Sec. 65; *Dartmouth College Case*, 4 Wheaton, 651; *Mt. Pleasant v. Beckwith*, 100 U. S., 531; *Meriwether v. Garrett*, 102 U. S., 511.

As the Wilmington corporate power, &c., *to supply water* has been conferred *since the Revolution*, it has been granted to, and accepted by the corporation and its inhabitants, subject to this legislative authority and control, as already stated.

Hence there was no right to hold this power or privilege of providing the water supply (especially by the agency of Council), free of legislative control and authority, *to be saved* and protected by said constitutional provision. Therefore it cannot rightly be claimed as a constitutional restraint upon the general authority of the Legislature over the corporation, or Council of Wilmington, in the present instance.

But it is insisted, on behalf of the plaintiff in error, that certain provisions of said Water Commission Act give said Board the power, in their execution of said Act, to detriment the rights of the holders of City Water Bonds—the redemption of which, when issued, had been secured by the sinking fund provisions of certain Acts setting apart each and every year specific sums of money that should be received from "water rents"—by diverting said sums therefrom, and thereby to violate the provisions of Sec. 10, Art. 1, of the Federal Constitution, which forbids the State to "pass any law impairing the obligation of contracts."

It is a sufficient answer to this objection, in the present proceeding, that it is not urged by, or at the instance of any of said Water Bond creditors. This Court, therefore, will not now pass upon this question. *Cooley Constit. Lim.*, 5th Ed., 196 (163.)

It cannot be correctly claimed that the appointment of the Water Commissioners by the Legislature was unconstitutional, or otherwise invalid, because they should have been appointed by the Governor, or elected by the people of Wilmington, or by their local representatives the Council of said city.

Our State Constitution provides that the Governor "shall appoint all officers whose offices are established by this Constitution, or shall be established by law, and whose appointments are not herein otherwise provided for."

Del. Const., Art. 3, Sec. 8.

But this provision does not apply to corporate officers.

State v. Wil. City Council, 3 Harring., 300, 302-3.

The Board of Water Commissioners are corporate officers. Indeed they are, by the Water Commission Act, expressly declared to be agents of the municipality.

Secs. 1 and 4 of Act of April 18, 1883, Vol. XVII. *Del. Laws*, pp. 408, 410; *Dillon Mun. Corp.*, 3d Ed. Sec. 58 (33); *Barnes v. Dist. Columbia*, 91, U. S., 540; *People v. Hurlburt*, 24 Mich., 69-70.

In the absence of Constitutional limitations, the power of the Legislature over municipal officers is complete.

Dillon Mun. Corp., Sec. 229, (168); *Cooley Const. Lim.*, 5 Ed. p. 334, (277) and note 2.

The appointment cannot be claimed in this instance to be inhibited by Constitutional implication because it is an assumption of an *executive*, instead of a legislative function, and therefore invalid.

People v. Hurlburt, 24 Mich., 63; *Cooley Const., Lim.* (5 Ed.) p. 136, and notes; *State v. Wil. City Council*, 3 Harrington, 300, 302-3.

Municipal Boards have frequently been appointed by the Legislature.

Baltimore v. Board of Police, 15 Md., 376; *Baird v. Rice, et. al.*, 63 Pa. St., 494; *People v. Walsh*, 96 Ill., 234; *Hudson Co. v. Seymour, 6 Vroom*, 35 N. J. L., 47; *People v. Mahoney*, 13 Mich., 492; *Phila. v. Fox*, 64 Pa. St., 170.

But it is claimed that these authorities are not properly applicable, or authoritative in the present case, because there is a supposed distinction between Municipal police, and the like, and Park and Water Commissioners, and similar Municipal officers.

It is urged that the former perform governmental duties pertaining to the preservation of the public peace, the administration of justice, and the like, which are essentially matters of public and State concern, and are therefore *State* officers, while the latter perform duties which are purely local, and consequently are merely Municipal officers; and hence that, while the former may be appointed by the State, the latter class may not.

This distinction was adopted in Michigan, and other States similarly situated, which had peculiar Constitutional provisions

restraining the Legislature thereof from appointing those Corporate officers whose duties were purely local and Municipal, in order to bring such within the operation of such provisions by distinguishing them from other Corporate officers whose duties were of more general and public concern, and therefore might be appointed by the Legislature in any such State.

But no such provisions exist in the Constitution of Delaware, and therefore the distinction is unnecessary, as it is inapplicable in this State.

Since the entire corporation is subject to the will and power of the Legislature, so must any of its constituents parts be, and consequently these may be created, appointed, controlled, or superseded in the discretion, and at the will and pleasure of the Legislature.

Barnes v. Dist. Columbia, 91 U. S., 540, 544-5.

Whether their powers and duties be purely local and municipal, or of more general and State concern, there is no restraint upon this power of the Legislature unless it be found in some clearly *implied* limitation of it, for none is *expressed* in the State Constitution.

Such implication must be clear and convincing to the Court. A reasonable doubt must be solved in favor of the Legislative action, and the act sustained.

Cooley Const. Lim., 5 Ed., 218, (182-3).

But it has been asserted that an indefeasible right of the municipality of Wilmington to elect or appoint for itself all its corporate officers is recognized, and guaranteed as forever inviolable, by the following provision, heretofore quoted, of Sec. 8, Art. VII, of our State Constitution.

"The rights, privileges, immunities and estates of religious societies and corporate bodies shall remain as if the constitution of this State had not been altered."

And hence that *this provision* is an *implied* constitutional restraint upon the power of the Legislature to appoint the members of said Board.

This proposition cannot be successfully maintained.

The said clause was neither a creative, nor a declaratory provision, but merely a precautionary one. It originated no new

rights, etc., nor did it confirm any doubtful ones. It simply saved, in the transition of government from the old to the new constitution, such only as had thereunto actually existed. This clause was not in our constitution of 1776. It first appeared in that of 1792.

No indefeasible right to elect or appoint its own local officers has ever belonged to the municipality of Wilmington. It is true that authority to appoint or elect such officers was conferred by the Crown Charter of 1739, and recognized by the Colonial Statute of June 13, 1772.

But prior to the Revolution, that provision of the Crown Charter, as well as the entire charter itself, could have been revoked and annulled by the Parliament of Great Britain. By the Revolution, as already shown, this, among other powers of Parliament, devolved on the people of Delaware, who have confided it to our General Assembly.

By virtue of Art. 24 of our Constitution of 1776, the said Statute of 1772, and all other acts relating to the Corporation of Wilmington, were merely continued in force *until* altered or repealed by the Legislature of this State.

Vol. 1, *Del. Laws*, Supplement, p. 89; *Dartmouth College v. Woodward*, 4 Wheaton, 651.

The right of Wilmington, therefore, after the Revolution, was to have its Charter Rights, etc., of election *only until* the Legislature should see fit to alter or repeal the same. This, then, was, and is, the real nature and extent of the rights, etc., intended to be saved by said Constitutional reservation. Consequently there never has been any such indefeasible or irrepealable right of election, etc., belonging to Wilmington; nor, therefore, any implied Constitutional restraint upon the power of the Legislature to appoint any of its corporate officers and agents.

But even if it could be shown (which is denied) that any such indefeasible right of election, etc., did exist at the adoption of our State Constitution of 1792, it is contended that, so far as concerned officers of the Corporation of Wilmington, their election, or appointment, and rights, powers and duties, the provisions of the Charter of 1739, and of the Act of 1772, and all other Acts relating thereto, were surrendered and superseded by the Corporate

acceptance of the Act of January 31, 1809, and as well by that of the City Charter of 1852.

See Secs. 1, 3, 4, 6, 9, 13, 24, 25, 27, Act of 1809; Vol. 4, *Del. Laws*, 275, 288; Charter of 1852, Secs. 101, 102, *Am. Code*, 444–5.

As every municipal charter granted subsequent to the Revolution is accepted subject to the American doctrine of the absolute power of the Legislature to alter or repeal the same, the election or appointment of the local officers and agents of the corporation of Wilmington, since its acceptance of the said Charters of 1809 and 1852, must now be subject to the absolute power of the Legislature either to appoint them itself or make such other provision respecting them as in its judgment may seem proper.

The foregoing, it is submitted, effectually disposes of any inference to the contrary from the *obiter dictum* of Harrington, J. in *Gray v. State*, 2 Harring., 93.

It is contended that the appointment of the members of said Board by the Legislature is invalid:

Because there is, *even in the absence of any* constitutional provision on the subject, "a fundamental right of local self-government" entitling the people of every municipality to elect or appoint their local corporate officers and agencies, whose duties are purely *municipal*, in view of and subject to which all State constitutions are framed, and which, therefore, by *implication*, inhibits the appointment of such officers by the Legislative power.

Such a doctrine is not affirmed, but negatived by the judicial decisions, rendered without this State, which should be accepted as authoritative here.

Barnes v. Dis'ct of Co., 91 U. S., 545–6; *Cooley Const. Lim.*, pp. 203–4, 209.

Where the right of local self-government in Corporations, has been affirmed, it will be found to be so by reason of express Constitutional provisions, manifestly showing it to be the policy and design of those who framed the Constitution and system of government of such States, to secure this right and prohibit its violation by the legislative power.

Dillon Mun. Corp., 3d Ed., Sec. 58, (33); *People v. Hurlburt*, 24 Mich., 44, 67, 86-7, 89-90, 109-110; *Struthers v. Phila.*, 4

Weekly Notes of Cases, p. 379; *People v. Mayor Chicago*, 51 Ill., 17 [2 Am. Rep. 278].

According to *State v. City Council of Wilmington*, 3 Harrington, 300, 302-3, our Constitution does not have reference to Corporation, but only to State officers.

This view of our State Court was also held by the Supreme Court of Pa. in case of *Commew v. Alex. J. Dallas*, reported in 3 *Yeates* 300 (*also* 4 *Dallas* 229). Since Pennsylvania and Delaware were united in their early history, and their policy and polity were therefore originally identical and similar, this Dallas case is of especial application and authority here on the point now under consideration.

The doctrine of 3 *Harr.* and 3 *Yeates* would therefore seem conclusively to show that, as the Conventions which framed our Constitution and system of government, *did not intend* that these should have any reference to Corporate officers, they could not, therefore, have framed these *in view of* and subject to this "fundamental right of local self government" which, it is claimed belongs to every Municipal Corporation.

Therefore, if such limitation exists at all, it must be by reason of some "higher law" doctrine of the right of local self-government in Municipal Corporations, which is to be found outside of our Constitution and of the design (as has been already adjudicated here) of the people of this State, who by their representatives in convention, framed it.

This "higher law" doctrine does not exist as to municipal corporations, according to the most authoritative decisions outside the State.

Barnes v. Dist. Columbia, 91 U. S., 545-6; *Phila. v. Fox*, 64 Pa. St., 181; see also *Cooley Const., Lim.*, 108, (89) 203-4 (169-70).

Nor does it exist in Delaware.

State v. Allmond, 2 Houst., 612, 23, 31, 34, 639, 640.

The restraints upon legislative power in Delaware are to be found only as expressed, or necessarily implied, in the State Constitution itself, or in the Federal Constitution.

State v. Allmond, 2 Houst., 612, 631.

If the legislative power is exercised unwisely or unjustly, it is for the people themselves to correct the evil through legislative

repeal, or constitutional amendment, and not by judicial usurpation.

Id., p. 634; *Cooley Const., Lim.*, 5 Ed., p. 229-32, (191).

George H. Bates and *George Gray*, on same side.

SAULSBURY, Chancellor (Opinion of Court):

On the 18th day of April, 1883, the General Assembly passed an act to establish a board of water commissioners for the city of Wilmington and for other purposes.

The act authorizes the city of Wilmington, through the agency of the board of water commissioners thereby created, constituted and appointed, and their successors in office, to take, convey into, and throughout said city the water of the Brandywine river from any point on said river or other wholesome water, and also to acquire and hold lands, real estate or personal property necessary for constructing acqueducts, lay pipe, constructing reservoirs, erecting buildings and machinery proper for the said works, and for purifying, conducting, storing and distributing such water and to purchase, take and hold lands and water rights, for supplying the citizens with good and wholesome water.

Three citizens of Wilmington were appointed and constituted a board of water commissioners for the said city under the act. Their terms of appointment were limited to two, four and six years.

At the expiration of the term of the said commissioner who should draw the shortest term and biennially thereafter the place of the retiring commissioner was to be filled by appointment by the mayor of the city of Wilmington for the term of six years. The said board of water commissioners was to have control of all matters relating to water supply in the city of Wilmington, of the management and direction of the water works then existing or thereafter to be constructed in connection therewith; to have charge and supervision of all mains, stop cocks and fire hydrants and other fixtures appertaining to the distribution of water through the city and of the collection of all revenues due, or to become due to the city of Wilmington for water, or accruing to the said city on account of the water works thereof, in virtue of any ordinance then existing; or of any rules and regulations thereafter to be passed by said board.

The ordinances of said city then in force relating thereto were to continue in force until the same should be changed in whole, or in part by the said board of commissioners. And all officers of the water department of said city were to be from the time of the organization of said board of commissioners under and subject to the control of the said board. And the terms of office of all the said officers were by the said act made subject to termination at the pleasure of said board, all such officers were to continue to perform the duties then devolved upon them by the ordinances of said city until the board should otherwise direct; and all books, accounts and property connected with the water department of said city or any office therein were to be used and disposed of according to the directions of said board.

The said board of water commissioners were by said act authorized at its discretion to appoint, employ and discharge all officers, agents, ministers and servants necessary for the management and service of the water works and for the collection of the revenues arising therefrom as the said act provided.

The said board were with all dispatch to prepare and resolve upon a plan for the permanent water works, best suited to the circumstances of the city of Wilmington, capable of affording an ample daily supply for the inhabitants of the city; and to acquire for the city of Wilmington by contract, or otherwise as in said act provided, all such real estate as might be needed for the construction of such extended water works; the title of any real estate so purchased to be vested in the mayor and Council of the city of Wilmington.

The said board of water commissioners were to have the right to charge the city of Wilmington with all water furnished each fire hydrant at the rate of $40 per annum or the city was in lieu thereof to pay to the water commissioners a sum of money as might be agreed upon by the City Council and said board, provided that in no case should the city pay less than $20,000 per annum.

For the purpose of defraying all the cost of acquiring real estate for reservoirs, laying pipe, purchasing engines, constructing all the works contemplated by the act and purchasing water rights it was made the duty of the city of Wilmington on the requisition of said board of water commissioners to issue bonds, each for the

sum of $100, or multiples of one hundred, payable in not more than 35 years from date of issue, to be denominated Wilmington city bonds to an amount not exceeding $120,000, bearing interest not exceeding 5½ per cent. per annum, which bonds the board of water commissioners might sell and dispose on the most advantageous terms possible.

The proceeds of the sale of all such bonds and also the revenue derived from the water works were to be received by said board of water commissioners and placed on deposit in such bank at Wilmington as should from time to time be the depository of the funds of the city to the credit of said board, and all money to be disbursed thereon on account of said water works was to be drawn upon warrant signed by the president of said board, and countersigned by the city treasurer and city auditor.

The water rates were required to be fixed by the said board of water commissioners at prices that should produce revenue sufficient at least to pay the interest on the water bonds and the running expenses of the water works, and the whole net income, rents and receipts of said water works in excess of what might be necessary for completing, constructing, operating and repairing the water works, for extending the water pipes and for interest on water bonds were to be set apart by the said board and solely appropriated to and for the payment of the principal and interest of the water bonds, and should be applied solely to that purpose until the whole of said bonds should be fully paid.

The City Council were required during the month of December in each and every year to notify the board of water commissioners of the amount of interest due and payable during the ensuing year on all loans created for the benefit of the water works, stating the time when due and the amount of interest payable, and the board of water commissioners were required to pay to the city the amount of interest due in each year, such payment to be made at least ten days before said interest was payable to the holders of any water loans.

The present controversy results from the passage of this act by the Legislature.

It is unnecessary to review the history of the legislation of the State conferring upon the corporation of Wilmington authority

in relation to the supply of water to that city. Such legislation seems to have commenced in 1799 and to have continued from time to time to the present.

Water works existed in the city of Wilmington prior to and at the time of the passage of the act referred to as being the occasion of the origin of these proceedings.

These water works belonged to and were under the control of the corporation. David H. Coyle, the plaintiff in error, was chief engineer of said works by appointment of the proper authorities at the time of the passage of the act to establish a water commission. The commission appointed by the act having qualified for the discharge of their duties as commissioners thereunder removed the said Coyle as such chief engineer and appointed Henry B. McIntire, the defendant in error, in his place and stead. Coyle refused to surrender his office as chief engineer and the property connected therewith to said McIntire in accordance with demand made upon him under the resolution adopted by the commissioners and thereupon the attorney-general of the State on the relation of Henry B. McIntire filed an information in the nature of a *quo-warranto* in the Superior Court in and for New Castle county, against him.

Judgment against the defendant was by agreement entered in the court below and a writ of error thereon sued out to this court.

The cause was very fully argued at the present term and it now becomes our duty to decide as to the rights of the parties to the proceeding.

While we have carefully examined all the authorities cited to us by counsel on both sides and maturely considered the positions assumed by each, we deem it unnecessary to review at length those cases, but shall confine ourselves to the consideration of such general principles as we consider necessarily involved in the determination of the cause and properly deducible from the authorities applicable thereto.

The plaintiff in error contends that the act of the Legislature to establish a board of water commissioners is unconstitutional and void. His counsel in their very able argument maintained in substance that a municipal corporation is of a dual character, and possesses two classes of powers and two classes of rights, public and private. That in all that relates to one class it is merely the

agent of the State and subject to its control, and that in the other it is the agent of the inhabitants of the place, and not subject to the absolute control of the Legislature, its creator. That among the latter is the right to acquire, hold and dispose of property to sue and be sued, just as certain rights are conferred upon private corporators and persons not *sui juris* such as minors and married women, but are not afterwards as long as they exist under legislative control.

They maintain in effect that the act is unconstitutional as being repugnant to that provision of the constitution of this State which provides that no man shall be deprived of his property except by due process of law. They contend that what they say is the private property of a public corporation is held by such corporation under all the constitutional guarantees as similar property would be protected by in the hands of individual owners and properties, and this protection exempts a public corporation as to its water works from the regulation and control of the State as effectually as against trespass and wrong committed by individuals.

This is in effect the position of the plaintiff in error.

The questions involved in this case necessarily lead to the consideration of the nature, character and powers of corporations, private and public.

A corporation is a legal institution devised to confer upon the individuals of which it is composed powers, privileges and immunities which they would not otherwise possess, the most important of which are continuous legal identity, and perpetual or indefinite succession under the corporate name, notwithstanding successive changes by death or otherwise in the corporations or members of the corporation.

It is a legal person with a special name composed of such members and endorsed with such powers and such only as the law prescribes. Dillon on Mun. Corp. 25.

It is an artificial being, invisible, intangible and existing only in contemplation of law. Dartmouth College case.

Being the mere creature of the law it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence. These are such as

are supposed to be best calculated to effect the object for which it is created.

Corporations are of two kinds, public and private. "Private corporations," says Cooley, "are created for private as distinguished from purely public purposes, and they are not in contemplation of law public, because it may have been supposed by the Legislature that their establishment would promote either directly or consequentially the public interest. They cannot be compelled to accept a charter or incorporating act. The assent of the corporation is necessary to make the incorporating statute operative, but when assented to, the legislative grant is irrevocable, and it cannot without the consent of the corporation be impaired or be destroyed by any subsequent act of legislation, unless the right to do so, was reserved at the time."

By the 19th section of the second article of the constitution of this State, it is declared that "no act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence by two-thirds of each branch of the Legislature, and with a reserved power of revocation by the Legislature; and no act of incorparation which may hereafter be enacted, shall continue in force for a longer period than 20 years without re-enactment of the Legislature, unless it be an incorporation for public improvement."

"Corporations," says Cooley, "intended to assist in the conduct of local self-government are sometimes styled political, sometimes public, sometimes civil and sometimes municipal, and certain kinds of them, with very restricted powers, quasi corporations—all these by way of distinction from private corporations."

Thus an incorporated school district or county as well as city is a public corporation; but the school district or county is not, while the city is a municipal corporation.

All municipal corporations are public bodies created for civil or political purposes; but all civil, political public corporations are not in the proper use of language municipal corporations.

A municipal corporation may be defined to be a body politic and corporate established by law to assist in the civil government of the State with delegated authority to regulate and administer

the local or internal affairs of a city, town or district which is incorporated.

"A body politic," says Lord Coke, "is a body to take in succession, formed as to its capacity by policy" and is therefore called by Littleton (section 4, 13) a body politic. It is called a corporation or body corporate because the persons are made into a body politic and are of capacity to take, grant, &c., by a particular name.

Public corporations for the government of a town, city or the like, being for public advantage are to be governed according to the law of the land. They are the mere creatures of the public institution, created exclusively for the public advantage without other endowments than such as the government may bestow upon them.

"It would seem reasonable," says Mr. Justice Washington, in Dartmouth College v. Woodward (4 Wheaton), "that such a corporation may be controlled and its constitution altered and amended by the government in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed because there is in reality but one party to it." There is in fact no contract in any just sense of that word, and public municipal corporations are not founded on contracts.

The city of Wilmington is a public corporation. It is a municipal corporation which is, as we have seen, an incorporation by the authority of the State of the inhabitants of a particular place or district, and authorizes them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns.

The style and name of the corporation is the Mayor and Council of Wilmington, and it is declared by its charter that by that name they shall be and are hereby made able and capable in law to have, take, purchase, receive, possess, enjoy and retain to them and their successors, lands, tenements, hereditaments, goods, chattels and effects of what kind, nature or quality soever, and the same to sell grant, demise, alien or dispose of, to sue and be sued, implead and be impleaded, answer and be answered, defend and be defended in all courts of law and equity, or any other place whatsoever, and also to make, have and use a common seal, and the same to break, alter

and renew at their pleasure, generally to have all the privileges and franchise incident to a corporation or body politic.

Because it is a municipal corporation the plaintiff in error contends that its inhabitants are constitutionally entitled to all the rights and privileges of independent local self-government, and that all the property which the corporation is capable to have, take, purchase, receive and possess not necessary for the discharge of purely governmental purposes is as against the State, as well as against individuals, subject to the absolute and uncontrolled possession of the corporation as solely and absolutely as is the property of a purely private corporation or of a private individual. And that the provisions of our constitution guaranteeing the rights of property to the owners thereof is applicable to such property and its owners, equally as to like property when owned by private individuals.

The theory of the plaintiff in error, as presented and discussed by his counsel, is a beautiful one. It has all the charm which attaches to the principle of local self-government.

Whether the universal recognition by legislative and judicial tribunals as applicable to municipal corporations would be attended by all the advantages, and result in all the beneficial consequences supposed by its advocates can only be determined when human experience in this respect, if ever, may safely be invoked as a final arbiter.

Does the law, as the court should determine it to be, support the plaintiff's theory?

All that is absolutely necessary for us to say upon this subject is this: The corporation of the city of Wilmington, that is the people residing in the district known as the city of Wilmington, the name and style of whose corporation, that is the incorporation of the persons and inhabitants of that particular place, is the mayor and council of Wilmington, is merely an agency instituted by the State for the purpose of carrying out in detail the objects of government. It is essentially a revocable agency. It has no vested any of its powers or franchises. Its charter or act of right to incorporation is in no sense a contract with the State. It is subject to the control of the Legislature, who may enlarge or diminish its territorial extent or its functions, and may change

or modify its internal arrangement or destroy its very existence at discretion. While it exists in subjection to the will of the State, whose will can only be expressed by the Legislature it enjoys the rights and is subject to the liabilities of any other corporation, public or private. It is because it is a body politic, and has a legal entity and name and a seal by which it can act, that in addition to these the Legislature endowed it with the capacity to contract and be contracted with, to sue and be sued, to hold and dispose of property. It is because it has this capacity and these powers that it can acquire rights and incur responsibilities. These franchises were bestowed by the Legislature upon it, that it might exercise certain powers of government, not independently of or in defiance of the Legislature over that particular part of the State known territorially as the city of Wilmington.

These are its rights affecting its relations to other persons. They do not affect its relation to the State because in certain particulars as a private corporation it may make contracts which it cannot impair. Its absolute dependence upon the will of the Legislature for its existence is not thereby diminished or destroyed. Its responsibility in respect to its contracts or torts does not affect its relationship to the State. In our opinion the State may continue its corporate existence and yet appoint all or any of the agencies through which it has heretofore been accustomed to act.

The city of Wilmington has no vested rights as against the State nor rights not subordinate to the authority of the State. In this respect it is precisely on the same footing and sustains the same relation to the State as all other municipal corporations within the State. It has no dual character, as a corporation it is either public or private. It is bound to fulfil its legal contracts and to answer before the legal tribunals for its torts in the same manner and to the same extent as a private corporation or a private individual. The courts for the administration of justice are equally open to to corporations of this character as to those of a private nature or to private individuals. Its rights to property legally held, including the control and government thereof, in respect to all parties other than the State, are the same as if it were a real and not an ideal being.

In the case of Borough of Dunmore's appeal, 52 Penn. St.

Reports, 374, the court say: "Municipal corporations being creatures of the legislative power are subject to the legislative will in a manner and to an extent to which citizens are not. The constitutional guarantees of the citizen were respected in giving him a right of appeal, the municipal corporations having no such guarantees the right of appeal was not given to them."

The counsel for the plaintiff in error referred us to the case of New Orleans, Mobile & Chattanooga Railroad Company vs. the city of New Orleans, 26 Louisiana Annual Reports, 481.

The first principle in his brief seems to be a transcript of a portion of the opinion of the court in that case.

The court among other things said: "A municipal corporation is appropriately defined to be 'the investing the people of a place with the local government thereof, Salk., 183. It has no powers not conferred upon it expressly or by fair implication by the law of the state creating it or statutes applicable to it. Both the persons and the place inhabited by them are indispensable to the constitution of such a corporation. It is an agency to regulate and administer the internal concerns of a locality in matters peculiar to the place incorporated, and not common to the State or people at large; but duties and functions may be and are conferred and imposed, not local in their nature. It possesses two classes of powers and two classes of rights—public and private. In all that relates to one class it is merely the agent of the State and subject to its control; in the other it is the agent of the inhabitants of the place—the incorporators—maintains the character and relations of individuals and is not subject to the absolute control of the legislature, its creator.

Among this latter class is the right to acquire, hold and dispose of property, to sue and be sued, &c.

It is true that these rights are originally derived from the Legislature, but once conferred they are to be exercised while it exists, at the will of the corporation, in its own, and as to its own interests, for the inhabitants, just as certain rights are conferred on private corporations and persons not *sui juris* as minors and married women, but are not afterwards under the control of the legislature."

In our opinion this case was properly decided, but we dissent

from much that was said by the judge in his opinion as interpreted by the counsel for the plaintiff in error. Much of what he said was not necessary. It was not necessary in that case that he should have said that a municipal corporation possesses two classes of powers, and two classes of rights, public and private, and that the latter is the right to acquire, hold and dispose of property, to sue and be sued, &c., and these remarks were not, in our opinion, in fact true.

The Legislature may, and generally does confer these rights upon all public corporations. The right to acquire, hold and dispose of property by a corporation does not make that property in any just sense of the word private property and the right and capacity to sue and be sued pertains no more to a private than to a public corporation.

The inhabitants of the city of Wilmington were constituted a corporation under the name and style of the Mayor and Council of the city of Wilmington, and were given a seal by the Legislature that they might acquire, hold and dispose of property, sue and be sued. But for what purpose or purposes? For public and not private purposes. The corporation is a public corporation. The uses for which the corporation may acquire and hold property must necessarily, we think, be public uses. Uses beneficial it may be some respects to the public at large, but certainly beneficial to the citizens generally of the municipality who may be called a particular local public, although a part of the general public of the State. Such property cannot in any sense be said to be private in the sense in which propety may be said to be private which is held by an individual citizen.

No citizen of Wilmington possesses any interest in the property of the municipality which is said to be private, which he can sell or in any manner dispose of. No portion of property held by the city passes to the local representatives of any inhabitant of the city or descends to his heirs upon his death; partition cannot be made of the real estate among the inhabitants in any manner known to law. Such property has not the incidents or qualities of private property attaching to property recognized as private among individual owners of property.

When a citizen of Wilmington removes from the city he

ceases to have any interest in the use of the property as one of the corporators.

When a person from the most distant part of the country moves into the city and becomes an inhabitant thereof he immediately becomes a corporator and entitled, as all other inhabitants, to an interest in the use of the property.

In the case cited from the Louisiana reports, the property in respect to which that case arose was public and not private property, that is to say, it was property held and owned by the city for the use of its inhabitants. The legislature had attempted to grant to a private corporation the right to construct a railroad upon or across this property, not under proceedings in condemnation, but absolutely and in deprivation of the right of the city in its property without providing that the private corporation should make compensation for the taking of it. Of course this could not legally be done, in one sense the property was private property, that is property owned by the corporation for the public use of the inhabitants of the city.

The inhabitants of a city, who are in fact the corporators under a charter creating a municipality are a portion of that general public which constitute a State. And they are also that particular public which constitute a municipality.

The municipality may hold property in which all the inhabitants of a state or of a county may be said to have an interest in some respect, but not as owners or proprietors. And it may also hold property in which the inhabitants of the municipality alone may properly be said to have an interest. Both classes of property are public. The one as to the people of the whole state or county, the other more particularly as to the inhabitants of the municipality.

It is only in this sense that the words public and private can with propriety be applied to such property when held by a municipality.

Although the property held for the municipality is in fact public as common to all the inhabitants of a city, it nevertheless may justly be said to be private property as being such property as is exempt from being taken or applied to any other public use by

the State, or by authority of the State, without compensation being made.

It was said in the course of the argument of the present case that the corporation of Wilmington owned a lot within the limits of the city, called the "sand lot." Now if the Legislature of this State had passedan act authorizing the Baltimore & Ohio Railroad Company to take any portion of this lot for the purpose of constructing their road, now in the course of construction through that city, without compensation, there could be no doubt that such an act would be unconstitutional as against the spirit of the constitution, which declares that private property shall not be taken for public use without compensation being made. The lot would be considered private as belonging exclusively to the corporation, although the use for which it is held by the corporation is public, for the benefit of all the inhabitants of the city. And the title in fact is in all the corporators, that is the inhabitants of the city. Had the Baltimore & Ohio Railroad Company in fact attempted to construct their road across this lot there can be no doubt that the city would have been entitled to an injunction restraining them from so doing.

While the municipality of Wilmington exists as a corporation, endowed with the capacity of purchasing and holding property, it has a right as against every other corporation or person to the use and enjoyment of its property as freely and fully as a private person can hold and enjoy similar property, but city corporations are emanations of the supreme law making power of the State and they are established for the more convenient government of the people within their limits.

In cities, for reasons partly technical and partly founded upon motives of convenience, the title of certain property is vested in the corporate body. It is not thereby shielded from the control to a certain extent of the Legislature as the supreme law making power of the State. While the corporation exists by authority of the State authorized to purchase and hold property for the inhabitants of the city to be paid for by the taxes levied upon the inhabitants, it would not, in our opinion, be competent for the State to take away such property and give it to other corporations or persons.

In case of the condemnation for public purposes as for instance

to enable the B. & O. Railroad Company to construct a road across the lot referred to, it would not, we suppose, be competent for the Legislature to direct that the condemnation money should be given to the corporation of the city of New Castle or should be applied to any municipal purpose of that city. But suppose the sand lot owned by the city of Wilmington should become worthless to the city or not adapted to any municipal use and valuable only for sale to private persons for building purposes. Could it be doubted that the Legislature might direct it to be sold and the proceeds be devoted to some municipal or public purpose within the city of Wilmington?

The right to acquire the property by means of taxation was conferred upon the city that the property so acquired might be useful to the city and we can imagine no limit to the control of the State over property so acquired consistent with the preservation of the property or of its proceeds for the uses and purposes for which it was acquired and the benefit of those for whom it was acquired.

The constituting a board of commissioners for the management of the property of a municipal corporation for the benefit of the corporators is no diversion of the property from the purposes of its acquisition. No title is thereby divested, and no property is wrongfully taken. In the case of the water works of the city of Wilmington, these works were not taken away from the city by the appointment of a board of commissioners to manage them; nor was their use diverted from its original purpose. Whether managed by the City Council or by the board of commissioners appointed by the authority of the Legislature, the uses and purposes of the water works—the supply of water to the corporators or inhabitants of the city—will be the same, and while these purposes and objects continue the same we can see no violation by the act of the Legislature of any equitable right of which the city may complain.

We have considered this question as though the city was in fact a party to this proceeding and complaining of a violation of its chartered rights; such however does not appear to be the case from the record before us.

David H. Coyle appears from that record to be the only party defendant below, and plaintiff in error here. He claims to hold

the appointment of chief engineer of the water department of the city of Wilmington by appointment of the City Council and he makes the objections that the act of the Legislature establishing the board of water commissioners is unconstitutional and that therefore the relator in this case has no authority to exercise the functions of chief engineer by appointment under the authority of said act.

We do not place our decision, however, in this case, upon the ground that the city of Wilmington or the Mayor and Council of the city of Wilmington are not technically parties to these proceedings, but upon the broad ground of the right of the relation under this or any other proceedings that can be had or taken to determine his right as between him and the plaintiff in error, or between him and the Mayor and Council, or any party or parties whomsoever.

We do not suppose that, if the powers conferred upon the board of water commissioners by the act of the Legislature creating it had by that act been conferred on the Council of Wilmington, any serious objection could or would have been made to the constitutionality of the act. If not, the controversy would be narrowed down to very small dimensions indeed. Has the City Council of Wilmington any vested or constitutional rights as against the State to manage or control the water works of the city of Wilmington or to appoint agents or managers to control them? They are the mere creatures of the Legislature, which can in a moment destroy, as in a moment it created them. The Legislature can divest the Council of any and every power and authority it possesses. It can direct that those powers should be exercised by any other department or agency of the city government and it could even direct that the functions now performed by the City Council should hereafter be performed by a like number of any other corporators of the city.

All the agencies of the city, that is of the corporators, can be abolished or changed at the will of the Legislature and even their functions terminated and assigned to other and different agencies. The Legislature can change the name and style of the corporation and even of the city itself without the consent and even against the will of the inhabitants. It may circumscribe or extend the limits of the corporation. It may divide the city into two, four or more cities and give to each a separate and independent organization

and burden the separate cities with such share in the payment of the existing debt of the city as shall be determined by a board of commissioners appointed by the Legislature for that purpose. It may declare that the amount so determined by such board shall be final upon the respective newly created cities. In the *borough of Dunmore's appeal*, 52 Penn. St. Rep., before referred to, a township being in debt four boroughs were created out of it. An act was afterwards passed authorizing commissioners to ascertain the indebtedness of the township and the amount due from the boroughs respectively and make a just distribution of the indebtedness between the township and boroughs and requiring all persons having claims to present them. An appeal was authorized from the decision of the commissioners on such claims. The court said, as hereinbefore recited: "This legislation is unprecedented and perhaps severe but it denies trial by jury only to municipal corporators who being creatures of the legislative power are subject to the legislative will in a manner and to an extent to which the citizens are not. The constitutional guarantees of the citizens were respected in giving him a right of appeal. The municipal corporators having no such guarantees the right of appeal was not given to them. The theory of the act was therefore unexceptionable.

May the city of Wilmington forever remain undivided and by the obedience of its inhabitants to law prove that it should be indivisible.

We have no doubt that should occasion arise for the exercise of the power the Legislature of the State would have the right to declare that the city of Wilmington should have and maintain not only suitable water works for the supply of the city with good and wholesome water but should have and maintain a proper fire department and proper gas works for the protection of the city from fire, and for the proper lighting of the city, for the convenience, safety and comfort of the inhabitants. They might authorize the levying of taxes upon the inhabitants of the city for the defraying of the expenses necessary for the accomplishment of these purposes, and they might appoint commissioners to do whatever was necessary to be done to effectuate the act.

What the Legislature might do in respect to Wilmington, they

might do in respect to any and all municipal corporations in the State where, in their judgment, a like necessity might exist.

The police power of a State is great, and may do whatever is necessary to promote the safety and health of the inhabitants of a municipality.

We do not consider it necessary to express an opinion in reference to any question not properly put before us, such as the issuing of bonds and the pledging of the faith of the corporation or the State to their redemption in any manner. If such bonds have been issued or shall be issued on the faith of the one or the other, or any such pledge has been or shall be made by the one or the other, it will be time enough to consider that question and the rights of the parties that may be affected thereby when it shall be presented for our consideration by parties capable of making it, and having an interest in its determination. No such parties are before us. It would not become us to express any opinion as to the wisdom or propriety of the enactment, the constitutionality of which has been the subject of contention before us.

We deem it not improper however to say that in our opinion the affairs of a municipal corporation should generally be administered in accordance with the will of its inhabitants, who, it is reasonable to suppose, are better acquainted with what will conduce to their comfort, happiness and prosperity, than others possibly can be.

Whether this act should have been passed by the Legislature was a question to be determined solely by the Legislature itself. We can determine only as to the constitutionality of what the Legislature has done and in our opinion, the city of Wilmington being a municipal corporation all its powers under its charter are subordinate to the powers of the Legislature.

The Legislature having the power to repeal its existence, necessarily has the power to alter, amend or abolish any of the agencies through which the powers of the corporation are exercised or to change them or to substitute others in their place.

That although the water works of the city may have been prior to the passage of the act to establish a board of water commissioners under the control and management of the City Council in any manner whatever and may have been exercised through any

agencies whatever, it was competent for the Legislature to alter and change that control, management and agency as they might deem proper. Such alteration of control, management and agency, provided the same was not a diversion of the object and purposes for which the water works were established, would effect no vested right of the city or the corporation as against the State.

The rights of the corporators to the property being secured to them and the property of the corporators being preserved for its original purposes, if such be the case, and we see nothing in the act establishing a board of water commissioners to the contrary, this court is not at liberty to declare the act itself unconstitutional.

The judgment below is therefore affirmed.

SUPERIOR COURT,

FALL SESSIONS,

1884.

SAMUEL W. MCCAULLEY and J. AUGUSTUS MCCAULLEY, executors and devisees of WILLIAM MCCAULLEY, deceased, appellants *v.* SYBILLA MCCAULLEY, widow and devisee of WILLIAM MCCAULLEY, deceased, respondent.

Defence in Orphan's Court—Widow's Election of Dower.

The Orphans' Court in this State is not a Court of Equity and has no power to refuse an order to assign dower upon any other defence than one which would be available at law.

An agreement between husband and wife and a trustee for the latter, made during coverture, that in consideration of her enjoying separately, and absolutely controlling her separate property, she would relinquish her dower in his lands, will not be effective as an equitable bar to her right of election to take dower in lieu of the interest given to her by her husband's will.

(*New Castle, Oct. 30, 1884.*)

APPEAL from the Orphans' Court of New Castle county in the matter of the assignment of dower in the estate of William McCaulley, deceased.

William McCaulley died on or about the twenty-second day of September, 1883, leaving a last will and testament, which was duly admitted to probate by the Register of Wills for New Castle county.

The testator devised a certain proportion of his estate, which largely consisted of realty, for the benefit of the respondent.

On the fifth day of January, 1884, the respondent made her

election to take dower in the real estate of her said husband in lieu of the estate so devised for her benefit, and on the same day filed her petition in the Orphans' Court for New Castle County, praying for the assignment of dower to her.

On the sixteenth day of February following, and before any order had been made upon the petition aforesaid, the respondent's counsel filed in the cause a certain deed executed between the said William McCaulley and Sybilla McCaulley, and one Robert Waddell, bearing date December 1st, 1868, the said deed being mentioned in the will of Mr. McCaulley.

On the sixteenth day of February aforesaid, the Orphans' Court allowed the appellants, as executors and devisees of Mr. McCaulley, by their counsel to intervene in the matter of the application for the assignment of dower aforesaid.

Whereupon the counsel for said executors and devisees filed the following exception to said application for dower, to wit:

"That the said petitioner in and by a certain instrument in writing filed in this cause bearing date the first day of December, A. D. 1868, between the said petitioner Sybilla McCaulley and William McCaulley the testator, her then husband, and one Robert Waddell of the city of Trenton and State of New Jersey, for the considerations therein mentioned, and by the receipt by the said petitioner of the benefits and advantages to her thereunder, did relinquish and bar her demand of dower in the estate of her husband William McCaulley, the said testator.

After argument by counsel, the Court, on the twenty-third of February last past, ordered that dower be assigned to the widow in accordance with the prayer of her petition, and directed the issuing of a commission to make such assignment.

On the same day, the executors and trustees prayed an appeal, which was granted, and an order made for the transmission of the papers and record in the case to this court.

This appeal lies by virtue of Section 10, Article VI, of the Constitution of Delaware.

Edward G. Bradford, for appellants:

The trust deed of December 1, 1868, between William McCaulley, his wife and Robert Waddell, clearly evidences a contract

between the husband and wife, that she should "renounce all interest in the real and personal estate of her said husband, the said William McCaulley, except what he may give and devise to her by his last will and testament or by deed or other instrument during his lifetime."

The deed merely serves to evidence the existence of a contract between husband and wife, and to execute it on the part of the husband.

This undertaking of the wife was supported by full consideration, viz.: The complete surrender by the husband of his marital right over the moneys, choses in action and other personal property of the wife, as well as her real estate.

It is true that the Married Women's Act of 1865 was then in force, but its operation was limited to "real estate, mortgages, stocks and silver plate belonging to any married woman at the time of her marriage, or to which she may become entitled at any time during her coverture."

Under the trust deed Sybilla McCaulley had full power to dispose of the property therein mentioned without the consent or against the will of her husband, by "gift, deed, assignment or writing in the nature of a will."

But the property transferred in trust was by no means limited to the several species mentioned in the act of 1865.

It embraced "certain United States bonds, New York 7 per cent. bonds, * * * certain moneys deposited in the hands of W. McCaulley & Co., and sundry other notes, bonds, debts, choses in action and personal property."

William McCaulley gave up all his marital rights over this property, and thus furnished ample consideration for the undertaking of his wife.

As soon as the deed became operative, the contract was *ipso facto* executed on the part of William McCaulley, while it remained executory on the part of his wife.

Upon this contract William McCaulley rested in good faith, and in and by his will not only recognized it, but made a provision in conformity with it.

He gave the income of one eleventh of his estate to his wife for life, "to be deemed and taken in lieu and bar of dower in my

estate. I make this provision for the love and affection I bear her, she having her own estate which is ample, and there being a marriage contract between us authorizing each party to have and manage his or her estate without the claim or interference of the other, and in bar of dower, said marriage contract being in the hands of ———— Waddell, of Trenton, New Jersey, etc."

Now having for nearly sixteen years received the benefit for which she contracted in bar of her dower, she has the assurance to press her application for its assignment.

At common law a jointure was not a bar to dower; but the wife could retain the former and also insist upon the latter.

Clancy on Married Women, 219.

But under the statute of 27 Hen. VIII, c. 10, dower could be absolutely barred by jointure of the required nature, made before marriage.

Clancy on Married Women, 213.

But that statute has never been adopted in whole, either in substance or terms, in Delaware.

In 1383 it was enacted with respect to the disposition of estates of decedents, that one-third should go to the widow, "unless it appear that an equal provision be made elsewhere."

App. 1, Del. Laws, 16, § 109.

No distinction was made in the above act between an equal provision made before and one made after marriage.

In either case, the widow was barred.

In 1697 it was enacted that "All testators real estates, to be invested and remain as their last wills and testaments devise the same. *Provided always*, that no less than one-third part of the said real estate be allowed and invested in the widow, during her natural life, except where due and equivalent provision hath been made before by the testator."

App. 1, Del. Laws, 24, §4.

Here also no distinction is made between provisions made before and after marriage.

So, in 1700 a similar provision was enacted.

App. 1, Del. Laws, 28.

In 1742 it was provided with respect to intestate real estate that one-third part thereof should go "to the widow of the said

intestate during her natural life, where such widow shall not be otherwise provided for by marriage settlement."

App. 1, Del. Laws, 66.

In the 24th year of George II., it was provided with respect to intestate real estate, as follows: "One-third part of the said lands, tenements and hereditaments to the widow of the said intestate, during her natural life (where such widow shall not be provided for by marriage settlement or otherwise)," &c.

1 Del. Laws, 288, Sect. 5.

It was not until 1816 that any provision was made by law for the widow's election, and then it was restricted to the case of a devise to her by her husband of a portion of his real estate.

5 Del. Laws, 175.

Such is the law in this State to-day.

Rev. Code, 534, Sec. 5.

The only statutory enactment in force here in relation to the barring of dower by jointure settled on the wife relates to the acceptance by her before marriage of "an estate in, or a charge upon real estate, to take effect at or before the decease of her intended husband, and continue during her life, as a provision for her support in lieu of dower in the real estate of her said intended husband."

Rev. Code, 533, Sec. 3.

Land need not be given to, or settled upon, a woman in order to bar her in equity of her dower. The acceptance of a term of years or of a sum of money, or of any other kind of collateral satisfaction, in lieu of dower, is a good bar in equity.

1 Co. Litt., 36 (b) N. 1; *Farrow v. Farrow*, 1 Del. Ch., 457; *Lawrence v. Lawrence*, 2 Vern., 365; *Davila v. Davila*, Ib., 724; *Mundy v. Mundy*, 2 Ves. Jr., **122, 129; *Clancy on Married Women*, 220, 223.

Nor is it necessary that the instrument should expressly purport to be in bar of dower.

Clancy on Married Women, 226.

Equity looks to substance and intention rather than form.

Clancy on Married Women, 223.

If, then, such collateral satisfaction is sufficient by way of

equitable jointure to bar dower, it is certainly a sufficient consideration for an equitable contract to that effect.

The Orphans' Court may take cognizance of any bar to dower, equitable as well as legal.

Farrow v. Farrow, 1 Del. Ch., 457.

In equity the husband and wife may in general enter into contracts with each other, and be bound accordingly.

1 Bishop on Married Women, Secs. 718, 719; *2 Spence's Equitable Jurisdiction*, *514; *Smith's Manual of Equity*, pp. 418, 437; *2 Story's Equity Jurisprudence*, Sec. 1395; *Slanning v. Style*, 3 P. W., 338; *Lucas v. Lucas*, 1 Atk., 270.

If it clearly appears that the wife has acted without compulsion, willingly and without threats or fear of her husband's displeasure, equity will uphold her transactions, although the husband may be the beneficiary.

Grigby v. Cox, 1 Ves. Sr., 517; *Essex v. Atkins*, 14 Ves., 542.

A court of equity will assent to a transfer to the husband of the wife's estate, when satisfied that the wife is willing and desires the transfer to be made.

Wiltats v. Cay, 2 Atk., 67; *Pearson v. Brereton*, 3 Atk., 71; *Clancy on Married Women*, 538-540; *Minet v. Hyde*, 2 Bro. Ch. Rep., 663; *Campbell v. French*, 3 Ves., 321.

Husband and wife can directly appoint to each other.

2 Sugden on Powers, 27; *Bradish v. Gibbs*, 3 Johns, Ch., 523.

While an acknowledgment was unnecessary, it was nevertheless made, before an officer authorized to take it, and evidences the freedom of the wife's will.

Reason and authority both require that in such a case as the present the wife should be bound by her contract.

Liles v. Fleming, 1 Dev. Eq., 185, 18 Am. Dec., 585; *Lehr v. Beaver*, 8 W. & S., 102, 42 Am. Dec., 271; *Shephard v. Shephard*, 7 Johns. Ch., *57; *Livingston v. Livingston*, 2 Johns. Ch., *537.

The contract has been fully executed on the husband's part, and the wife now seeks to set it aside, after having enjoyed a full consideration.

For the petitioner to claim dower under existing circumstances

is a fraud upon her husband and his estate, and equity will assist only those who come into court with clean hands.

Charles B. Lore, for respondent:

It is a well established rule of the common law that a wife cannot relinquish her dower in the real estate of her husband by executing a release to him, nor in any other way than by joining with him in a conveyance to a third person.

2 Scribner on Dower, 309; *Carson v. Murray*, 3 Page, 483; *Rowe v. Hamilton*, 3 Greenleaf, 63; *Martin v. Martin*, 22 Ala., 82; *Crain v. Cavana*, 38 Bar., 410; *Markling v. Markling*, 30 Ark., 17; *Pellon v. Wade*, 31 Ark., 678; *Gebb v. Rose*, 40 Md., 387.

Even an agreement made during coverture between a husband his wife and a trustee of the latter, that in consideration of her enjoying separately, and absolutely controlling her separate property, she would relinquish her dower in his lands is invalid and cannot be enforced against her in an action for her dower.

2 Scribner on Dower, 309; *Townsend v. Townsend*, 2 Sanfd., S. C., 711; *Gandob v. Brown*, 2 Abb. N. Co., 295; *Randall v. Randall*, 37 Mich, 513; *Martin v. Martin*, 22 Alab., 86; *Walsh v. Kelley*, 34 Pa., 84.

It is a general rule that although Courts of Equity have concurrent jurisdiction with courts of law to the assignment of dower, yet in the exercise of that jurisdiction where the widow is seeking an *equitable* relief they will treat her claim on a strictly legal right, and be governed by the same rules by which courts of law are controlled, and will not allow an equity to be interposed to defend the dower.

2d Scribner on Dower, 164; *1 Story. Eq.*, Sec. 630; *Maybury v. Brian*, 15 Peters., 21; *Blain v. Harrison*, 11 Ills., 384; *Todd v. Bylon*, 4 Leigh., 498; *O'Brien v. Elliott*, 15 Maine, 125; *Potter v. Barclay*, 15 Ala., 409; *Campbell v. Murphy*, 2 Jones Eq., 357; *Ridgway v. Newbold*, 1 Har., 305; *Gana v. Gilruth*, 4 Greese., 453.

A married woman can enter into no contract that will bind her after her coverture (except as prescribed by law.)

Ross v. Singletin, 1st Bolus, Ch., 154.

These cases and the reason of them fully establish the principle,

that a married woman can make no contracts during her coverture which shall bind her after she becomes sole unless they be made conformable to certain rules established to operate upon and bind married women.

Nor can she be compelled to make good or execute such a contract.

A Court of Equity cannot, in the observance of fraud, accident or mistake give validity to a contract which is void in law.

Statutes for barring Dower; *Rev. Code*, p. 533; *Rev. Code*, p. 501, Sec. 83.

The deed of a married woman is valid only when taken and acknowledged in conformity with this section.

This contract was not acknowledged before any officer recognized by Sec. 10—and is void.

Where there is an omission of some statutory requirement in the deed of a feme-covert, essential to its validity the mistake cannot be corrected by the court.

Gebb v. Rose, 40 Md., 387.

Anthony Higgins, for appellants:

If the jointure, settled before marriage with the intention to bar dower be wanting in many of the materials required by the statute, a Court of Equity acting on the consciences of the parties, will enforce a compliance with the contract by the widow, and restrain her from suing for Dower.

Clancy, 219-220.

However, although the 27 Hen. will be so far restrained in its operation, equity in the exercise of this jurisdiction will always attend to this distinction made by the statute itself, between provisions settled before and during the marriage, for if they be before marriage, the court *following the act*, will consider them as bars to dower, and if during the marriage, then the widows will not be obliged to take such provisions in lieu of their dower, but will be at liberty to accept or reject them.

Clancy, 220; *Clancy*, 231; *Scho. v. Sef.*, 449.

Provisions made during coverture may be divided into two heads:

1. Instruments completed when executed, as deeds, bonds, etc.
2. Wills, etc.

This rule of election may be applied to deeds as well as to wills, yet the decisions on this subject are confined to the latter only, for which Lord Redesdale accounts in this way.

It is settled that any provision, however inadequate and precarious it may be, for which a woman contracts, and which she agrees to accept in lieu of her dower, may be a valid jointure in equity.

Clancy, 220, 221.

A court of equity will carry into execution any terms for a married woman, without regard to the nature of the property, and *without regard to the form of the instrument in which the contract has been entered into;* and hold them to be a bar to dower if *the intention appear to have been such.*

Clancy, 223; *Davila v. Davila*, 2 Vern., 724; *Drury v. Drury*, 2 Eden., 60; *Estcourt v. Estcourt*, 1 Cox, 20.

An antenuptial contract, which secures to the wife her separate property, and makes no provision for her out of the husband's estate, is a good equitable jointure, if it be a part of such agreement that that wife shall relinquish her dower.

2 Scrib., 389, Chat. 15, Sect. 42, 43; *Andrews v. Andrews*, 8 Term, 79; *Murphy v. Murphy*, 12 Ohio, St. 407; *Healds Petition*, 2 Foster, 265; *Cauley v. Lawson*, 5 Jones Eq., 132; *Logan v. Phillips*, 18 Mo., 22.

The authority of *Courts of law* to admit collateral provisions to bar dower is founded on the Statute of Hen, 8.

But the jurisdiction of Courts of Equity in these matters, existed before that act, upon the principle of enforcing agreements entered into between individuals.

2 Scrib. on Dow., Chap. 15, Sec. 33-(408); *1 Roper H. & W.*, 487.

The husband and wife may, in general, enter into contracts with each other, which to an extent not easily defined, will be recognized as good and enforced in equity.

1 Bishop Mar. Wom., 718; *Ibid*, 166; *2 Spere*, 514; *2 Storys, Eq.*, Smith Manual of Eq., 418, 427, 720.

The wife's inchoate right of dower is a valuable thing held by her, and is therefore good as a consideration.

1 Bishop, 722, 723, 758; *Learing v. Learing*, 9 Page, 283; *Garlick v. Strong*, 3 Paige, 440; *Needham v. Sawyer*, 17 Pick, 500.

The wife's contract with her husband will be sustained not only when it is for her benefit, but as well when it casts a burden upon her.

1 Bishop Mar. Wom., 167.

The wife's agreement for a reasonable consideration to make an allowance to her husband out of the income of her separate estate will be upheld in equity.

1 Bishop, 167; *2 Storys, Eq.*, 1372; *More v. Freeman*, Bunbury Rep., 205; *Livingston v. Livingston*, 2 Johns Ch., 537, 539.

If the instrument be intended to secure jointure the form of it is immaterial.

Davila v. Davilo, 2 Vernon, 274.

A *covenant* to pay a widow an annuity for her life, not charged on lands, is a bar of dower.

Drury v. Drury, 2 Eden, 39; *Estcourt v. Estcourt*, 1 Cox, 20; *Wizard v. Singden*, cited in *Drury v. Drury* and in *Estcourt v. Estcourt*, 1 Cox, 22; *Clancy*, 227.

Agreement between husband and wife enforced.

Shephard v. Shephard, 7 Johns. Ch., 57; *Lites v. Fleming*, 1 *Der. Eq.*, 185; 18 Am. Dec., 585; *Lehr v. Beaver*, 8 Watts. & S., 102, 42 Am. Dec., 271.

COMEGYS, C. J.:

The first question to be settled is, as to the nature of the Orphans' Court. The defence made in this case is not a legal one, but purely equitable—assuming it to be a defence to the widow's petition. Of course, it is no defence at law, and a court of law would not notice it; but the counsel for the devisees not only claim it to be a good bar in equity, but also that the Orphans' Court is a Court of Equity and can give effect to it. Both these contentions are opposed by the petitioner. The question of jurisdiction, being thus raised, must be first settled. If this court should decide adversely to the claim of jurisdiction, there is an end of the appeal, whatever opinion may be held of the nature and quality of the alleged bar.

The authority cited by the counsel for the devises in support of their position that the Orphans' Court is a Court of Equity for the purpose of giving effect to defences of an equitable nature against dower, is that of Farrow v. Farrow, decided by Chancellor Ridgely sitting as Judge of the Orphans' Court in Kent in 1822. 1 Del., Chancery—Appendix 457. In that case it was a question whether the court could give effect to a contract alleged to be an equitable bar; and the Chancellor decided that it could, on the ground that the Orphans' Court "is a Court of Equity as to all matters within its jurisdiction, and whatever is a bar at law or in equity may be pleaded."—Page 462.

This decision not being absolutely binding on this court, although entitled to the utmost respect as coming from one so able and learned as the late Chancellor was, and no provision, constitutional or statutory, being pointed out by him for his decision which appears to authorize its comprehensive language, it is proper that we should ascertain what is the true nature and scope of the jurisdiction of the Orphans' Court. It is one thing, it is conceived, for a court to have certain equitable jurisdiction, and quite another to be a Court of Equity with respect to it. The distinction may appear to be subtle; but it is not, as will be found hereafter.

It is a well established principle of the law, that special jurisdictions are to be regarded strictly, and the acts creating them are not to be liberally construed. Though it may be the part of a Judge, having general cognizance, using the old maxim, *ampliare jurisdictionem*, yet no such liberty will be given to a special Court. We have many examples in our reports where the general doctrine I have announced has been recognized and acted upon. There is, in fact, no law anywhere to the contrary. What, then, is the jurisdiction of the Orphans' Court? To determine this requires a retrospect into the history of the establishment of courts in this locality, and the powers assigned them.

Upon the restoration to the English of the places that had been captured from them by the Dutch in the war ended by the treaty of Westminster of the 9th of February, 1674, the Duke of York resumed possession of his grant from his brother King Charles II—of which New York and its dependency, the Delaware Colony, formed a part—and thereupon by his Governor, Sir

Edmund Andros, promulgated the laws which, eight years before, had been established at Hempstead, Long Island, for the government of the main possession. The ordinance of Andros, by which the laws were introduced here contained the following:

"2. That there be three courts held in the several parts of the river and bay, as formerly, to wit, one at New Castle, one above at Uplands, and another below at Whorkil.

3. That the said courts consist of Justices of the Peace whereof three to make a quorum, and to have the power of a Court of Sessions without appeal, in which court the oldest Juctice to preside, unless otherwise agreed among themselves; above twenty pounds and for crime extending to life, limbo, or banishment, to admit appeal to the Court of Assizes.

4. That all small matters under the value of five pounds may be determined by the court without a jury unless desired by the parties, as also matters of equity." Page 456.

The Court of Assizes, by the Duke's laws, was to be held in New York once a year on the last Thursday of September. Page 11.

By one of the Duke's laws it is provided as follows (page 44): "That all persons who now have or shall have any estate of goods, chattels, or lands in their possession belonging to any that are under age, shall exhibit an inventory and accounts of that said estate within three months next after publication of this law to the respective Court of Sessions where such estate shall be, and afterwards yearly; and in case such person or persons who have such estate in their hands do not at the time and place aforesaid present the inventory of such estates as aforesaid, then the whole business to the next Court of Assizes where the offender shall be fined for neglect of duty as aforesaid," etc. Here is the first statutory provision with respect to the estates of orphans, and relates to the duties of executors and administrators. There was, before, given to the Court of Sessions, as above stated, equity jurisdiction generally: here is a special jurisdiction but it is one rather ecclesiastical as belonging in England to the ordinary, than equitable as pertaining to a Court of Equity. But it is not legal.

When Penn took possession of his grants from Charles II and the Duke of York, and set up his government over his Province

of Pennsylvania and "the three lower counties upon Delaware" —now the State—he caused to be enacted what is called, in the volume cited, "The Great Law, or the Body of Laws of the Province of Pennsylvania and territories thereunto belonging passed at an assembly held at Chester, alias Upland, the 7th day of the 10th month, called December, 1682." The 67th chapter is as follows:

"Be it enacted, &c., That the Justices of each respective county Court shall sit twice every year to inspect and take care of the estates, usage and employment of orphans, which shall be called the Orphans' Court, and sit the first third day of the week in the first and eighth month yearly (March and October), that care may be taken for those that are not able to take care for themselves." Duke of York's Laws, p. 131. This is the first legal provision for a distinct session of Court for Orphans' benefit, and is the origin of the tribunal of Orphans' Court, now a constitutional body.

In Chapter 156 of the "Laws made at an assembly held at New Castle the 10th day of the 3d month (May), 1684," is to be found the following: "That monthly and quarterly sessions be held in every county in this Province and territories by the respective Justices, and that each Quarter Sessions be as well a Court of Equity as of Law, concerning any judgment *given in cases by law capable of trial in the respective County Sessions and Courts.* By this it appears, not that the sessions were to be Courts of Equity, but only that *in cases by law capable of trial in them,* they should have equity jurisdiction also, with respect to such cases. This is very intelligible; it made those Courts equity as well as common law tribunals *as to all matters within their common law jurisdiction.* Id. 167.

By the 158th chapter there was provision made for a Court of Appeals, and for circuit duty. Id. 168.

By the 42d section of the Petition of Right addressed by the freemen of Pennsylvania and the counties to Benjamin Fletcher, Governor, it is provided, as follows: "That the Justices of the respective county court (Court of Session) shall sit twice every year to inspect and take care of the estates, usage and employment of orphans, &c., the same as in Penn's "Great Law," above quoted. Id. 205.

During the Governorship of Benjamin Fletcher, and in the 5th of William and Mary (1693), certain laws were passed by him by the advice and consent of the Provincial Legislature, the third of which is "The law about appeals to the Provincial Courts." By the first section of this act, the jurisdiction civil and criminal of the County Courts is declared, and it is provided that they "shall be held and kept quarterly in every county of this Province and counties annexed, and oftener if occasion be, which County Courts shall be Courts of Equity for the hearing and decreeing all matters and causes cognizable in the said Courts under the value of ten pounds." Then provision is made for appeal to the Provincial Courts, to be held for the county.

This enactment established equity jurisdiction in the Sessions Court, or County Court, under ten pounds. Id. 225.

In 1701 the separation took place between the Province and the Three Lower Counties, and thenceforth there were distinct legislative bodies. But before that event an act was passed entitled, "An act for establishing Courts of Judicature in this Province and Counties annexed," by the first section of which it was directed that there should "be holden and kept a County Court of Sessions" four times a year in each of the counties of Philadelphia, Bucks and Chester (the three upper counties) and in New Castle, Kent and Sussex (the three lower counties) four times each year on certain days mentioned in May, August, November and February, and that there should be a competent number of Justices in every of the said counties appointed by the Governor," &c., three of whom should be a quorum, and were thereby impowered to exercise criminal jurisdiction and "shall award process, call special court, hold pleas, and hear and determine all actions, suits and causes, civil, criminal, real and mixed, observing as near as may be respecting the infancy of this government and capacities of the people, the methods and practice of the King's Court of Common Pleas in England," &c. In the clause next but one following it is enacted—"further, that the said Justices in the respective County Courts shall have full power and are hereby impowered and authorized to hear and determine all such matters and causes of equity as shall come before them in the said courts, wherein the proceed-

ings shall be by bill, answer, with such other proceedings as are necessary in Chancery Courts and proper in these parts," &c.

By the next section a Provincial Court, to consist of five Judges, was established, to sit twice a year in Philadelphia, at least two of the five Judges of which were to go circuit into the counties and hold a court twice in each year on certain fixed days for each county. These courts had jurisdiction of capital felonies (which the County Courts had not) and also apellate jurisdiction from the latter. Notice of the appeals however was to be given by the clerk to the Governor, who was to notify the Judges. Page 113. The Governor also upon application of a party—who had ground to move in arrest of judgment, but did not do it in time—had power to issue a writ of error, &c. The notice to be given by the Governor in cases of appeals, to the Judges (who were to hear them) is probably all that is meant by the expression quoted by Chancellor Ridgely from the 8th Section of the act for establishing Orphans' Court, Vol. 1, D. L., p. 92, or it may be explained by some supposed sovereign power of equity in Governors, as Sir William Keith, Governor from 1717 to 1726 once announced his purpose to hold with the assistance of his council a Court of Chancery for the Province upon a complaint made that Courts of Chancery or Equity had been too seldom held therein. *Duke of York's Laws*, 386.

On page 317 of this volume, it is provided that for the better regulating the Orphans' Court of this government, it is hereby enacted, "That the Justices of the respective County Courts, or a quorum of them, calling to their assistance the Register General, or his deputy for the time being, in each county of this Province and Territories, shall have full power and are hereby impowered to hold and keep the said Orphan's Courts, after the business of the County Court in spring and fall is over, or as often as they shall see occasion, in the same places where the respective County Courts are held from time to time; with full power to award process and cause to come before them all and every such person and persons as are or shall be intrusted with, or in any ways accountable for, any lands, tenements, goods, chattels, or estate belonging or which shall belong to any orphan or persons, under age, either as guardians, tutors, trustees, executors and administrators, and cause

them to make and exhibit, within a reasonable time, true and perfect inventories and accounts of the said estates; and to require and take bonds and security of such guardians, trustees, tutors, executors and administrators for the legacies, portions, shares and dividends of estates, real and personal, belonging to orphans or minors as occasion shall require. With power also to make equal distribution of the surplusage of the said estates as to justice and equity shall appertain; having due regard to the directions and bequests of all last wills and testaments in ordering such distributions, as also to the laws of the government from time to time. With power also to admit orphans or minors, when and as often as there may be occasion to make choice of guardians, or tutors, and to appoint guardians, next friends, or tutors over such as the said court judge too young or incapable, according to the rules of the common law, to make choice themselves: and to order and direct the binding and putting out of orphans or minors apprentices to trades, husbandry, or other employments, as shall be thought fit. And that all guardians, trustees, administrators or tutors which shall be appointed by the respective Orphans' Courts shall be admitted and received, without further admittance, to prosecute and defend all actions and suits relating to their pupils, orphans, or minors, as the case may require, in any court or courts of this Province and Counties annexed. *And it is further* enacted that if any person or persons being duly summoned ten days before the day to be appointed for his or their appearance in the respective Orphans' Court to which the summons is returnable, shall refuse or neglect to appear according to summons, or if when they appear do refuse or delay to become bound, to bring in their inventories, or render accounts as aforesaid, then it shall and may be lawful for the Justices of the respective Orphans' Courts to issue forth their warrants for arresting and committing the person or persons so refusing, or neglecting, to the county gaol where he or they are or can be found, there to remain until they comply with the court's order in that behalf. *Provided always,* that those who bring inventories, give bond and make accounts in the Orphans' Courts pursuant to this act, shall not be obliged to give bond, exhibit inventories or accounts for the same things or estate, to the Register General's office or elsewhere, but that all persons, having the power

of probate of wills and granting administration, in this government shall cause all inventories and accounts as shall be brought to them relating to orphans or minors estates, into the respective Orphans' Courts as aforesaid, to be filed and kept there, and shall receive and take the fees due for the same as if they were to be filed, entered, copied and transacted in the Register General's office." This act was passed 28th October, 1701.

After the separation between the Province and "Lower Counties," an act was passed entitled "An Act for establishing Orphans Courts." The date is not given; but it was somewhere between 1721 and 1726. After referring in the preamble to the fact that several important matters are directed to be done by the Orphans' Court, but that upon perusal of the law directing the doing thereof the same appears to be very deficient, and divers orphans, and persons concerned for them, or entrusted with their estates, labor under great inconveniences, the act provides that the Justices of the Court of General Quarter Sessions of the Peace in each county of this Government, or so many of them as are or shall be, from time to time enabled to hold those Courts, shall have full power and are hereby impowered in the same week that they are or shall be directed to hold the same Courts, or at such other times as they shall see occasion, to hold and keeep a Court of Record in each of the said counties, which shall be styled The Orphans' Court; and to award process and cause to come before them all and every such person and persons who as guardians, trustees, tutors, executors, administrators, or otherwise are or shall be entrusted with or anywise accountable for any lands, tenements, goods chattels or estate belonging, or which shall belong to any orphans, or any persons under age, and cause them to make and exhibit within a reasonable time true and perfect inventories and accounts of the said estates, and to cause and oblige the Register, or such person or persons as for the time being shall have the probate of wills and granting letters of administration in this Government, or deputies upon application made in that behalf, to bring or transmit into the Orprans' Court true copies, or duplicates of all such bonds, inventories, accounts, actings and proceedings whatsoever, now or hereafter being or remaining in the respective offices or elsewhere within the limits of their authority, as do or shall concern or relate to the said

estates, or any of them, and to order the payment of such reasonable fees for the said copies, and for all other charges, trouble and attendance which any officer or other person shall necessarily be put upon in the execution of this act as shall be equitable and just; and if upon hearing or examination thereof it appears to the Justices of the said Court that any of the said officers have misbehaved themselves to the prejudice of any minor, or any concerned for them as aforesaid, the said Justices are hereby required to certify the same accordingly, which shall be good evidence for the party grieved *to recover his damages at common law.* And where any letters of administration shall be granted, and no bond with sureties given as the law in that case requires, such letters of administration shall be and are hereby declared to be void and of none effect; and that the officer or person that grants the same, and his sureties, shall be, *ipso facto*, liable to pay all such damages as shall accrue to any such person or persons by occasion of granting such administration; and the party to whom the same shall be so granted may be sued as executor in his own wrong, and shall be so taken and deemed in any suit to be brought against him for or by reason of his said administration." Then follow other provisions in various sections, all enacted with a view to minors' interests. It is unnecessary to quote them.

The object of this act appears to have been to establish the Orphans' Court as a distinct tribunal unconnected with the County Court, though having the same judges, and also to more correctly define its jurisdiction, as well as enlarge it so that it should embrace every subject affecting the interest of orphans or minors. The 7th section gives the judges power to issue attachments for contempt, and force obedience to "their warrants, sentence or orders concerning any matter or things cognizable in the same courts by imprisonment of body, or sequestration of lands or goods as fully as any Court of Equity may or can do." Then comes the section referred to by Chancellor Ridgely in Farrow v. Farrow. "Sec. 8. Provided always that if any person or persons shall be aggrieved with any definitive sentence on judgment of the said Orphans' Court, it shall be lawful for them to appeal from the same to the Governor for the time being, in equity, which appeal, upon security given as is usual in such cases, shall be granted accordingly."

We find no change in the Orphans' Court until 1802, when an amendment was made to the constitution, adopted in 1792, annulling the 15th section of the 6th article, which constituted the Judges of the Court of Common Pleas the Orphans' Court, and making the Chancellor the sole Judge thereof. This state of things continued till our present constitution was adopted in 1831, which composed the Court of the Chancellor and the resident Judge of the county. In the abrogated section of the 6th article, it is provided that the Common Pleas Judges shall and may exercise the *equity jurisdiction heretofore exercised by the Orphans' Court*, except as to the adjusting and settling of Executors, Administrators and Guardians accounts, etc.; Hall's Digest, 25. The same language is used in the substituted provision, Ib. 30. In the constitution of 1831 it is provided, with reference to the Orphan's Court "This Court shall have all the jurisdiction and powers vested by the laws of this State in the Orphans' Court": Sec. 10 of Art. 5.

With these different provisions of law and constitution as our only guide to go by, we are called upon to give our opinion whether the Orphans' Court is a Court of Equity.

It will be seen, at once, upon reviewing the several provisions of law to which I have referred, or quoted, and they are all that bear upon the question, that the Orphans' Court can only be considered a Court of Equity in a very restricted and modified sense. It is certainly true that, at the time Farrow v. Farrow was decided, the acts to be performed by the Court were of an equitable nature, and the proceedings and jurisdiction were such as pertained to a Court of Equity: but that did not make it a Court of Equity in the full sense of that term, but only gave it a "limited statutable jurisdiction" (using language of Judge Story) to be exercised, not by virtue of the court's inherent powers (for it had none) but as designated by statutory provision. In the beginning there was no distinct court, but the Justices of the Superior Courts or County Courts were to perform certain offices or duties with respect to the estate of *minors*. When the Courts of Common Pleas were created, these functions were transferred to the Judges of those courts whose sessions were to be in the same week as those of the Pleas Courts. Then the Court came to be held by the Chancellor by the

constitution of '92, and later (as now) by him and the Associate Judge of the county.

It may be conceded to be true that all the Orphans' Court jurisdiction is of an equitable character, and that its modes of proceeding are in the main, similar to those used in equity; and yet that will not make it, what it must be to try the plea in this case, a Court of Equity. *Sub modo* it is such a court; but it cannot entertain a bill for relief, or discovery as a Court of Equity can. By the old statutes it could call before the Justices, executors, administrators, guardians and others who had property of orphans in their hands, and make them exhibit inventories accounts, &c., and bind out minors to apprenticeships, invest their money, &c., but though this was equity jurisdiction to some extent, it was all to be done *secundum formam statute.* It had no other power than the statute gave. The establishment of Registers' Courts, and the jurisdiction they were endowed with, took away the control over executors and administrators to a great extent—a power, as has been before suggested, rather ecclesiastical than equitable. As evidence that the Orphans' Courts were not Equity Courts, but only Statutory Courts with jurisdiction of very limited equity subjects, and without any general power of relief even in them, I refer to the first section above in part quoted of the act, above mentioned, for establishing Orphans' Courts (Vol. 1, Del. Laws, 87) wherein it is provided that if upon hearing and examination thereof (that is, of the proceedings of those having to do with minors' property) it appears to the Justices that the minors' interest has been prejudiced by their misbehavior, the Justices are to certify the fact, which would be good evidence "for the party grieved to recover his damages at the common law." Why such a provision, if the Orphans' Court was a Court of Equity? A Court of Equity having taken jurisdiction of such a case for relief, would give it without sending the minor to the common law for recovery of damages for breach of the official bond. Looking at the question before us in every light that shines upon it for my vision, I cannot view the court as a Court of Equity like the Court of Chancery is even for or with respect to the subjects of its own jurisdiction; but simply as a court created by statute and invested with a small portion of equity jurisdiction, or rather with limited

and expressly defined jurisdiction over a very few subjects of equity cognizance, in which it proceeds (it could not appropriately do otherwise) by certain equity forms prescribed by law. But, as Courts of Equity in the ordinary sense do, it cannot proceed to hear any case in such manner as to give, where the circumstances require it, relief as in cases tried upon bill, answer, exhibits and depositions. There is no process of the court, or practice, by which the conscience of a party can be searched for evidence, no course of trial by depositions, no machinery or rules of pleading—nothing but simple petition, and appropriate action thereunder.

The jurisdiction of this Court to divide land among the parties entitled, is a legal as well as equitable jurisdiction, and was so when the first act was passed creating Orphans' Court jurisdiction; and when the dower act of 1816 was passed (that under which the petition in this case was filed) no jurisdiction of an equitable nature, in dower, was given to the Court, but only the power to lay it off by such machinery as it employed in cases of intestate estates. No express power is given to the Court to try any defence made to the widow's petition; that held to result from the language of the act, cannot, by any reasoning satisfactory to me which I have yet heard, be taken to invest a Court of the limited scope I have pointed out the Orphans' Court to be by the laws of its creation, with power to entertain and pass upon a defence so peculiar as that set up in this case, but denied to be valid anywhere; one which certainly depends for its allowance upon an equity only expressly asserted in the single case of Livingstone v. Livingstone, brought before us by the counsel for the devisees.

As illustrative of the defective nature of the equity powers of the Orphans' Court, I would call attention to what I may treat as a fact—that if a widow petitioning for dower under the act of 1816 had to rely upon discovery through the defendant of her husband's title to the lands out of which she claimed her dower, she could get no discovery through the Court's power, but would have to resort to the Court of Chancery for the exercise of the necessary equity power in the premises. Why should this be if the Orphans' Court is a Court of Equity adequate for the trial of dower cases, where equitable relief is needed in the support of petitions for assignment?

The consideration I have been able to give to the subject of dispute in this case satisfies me that the Orphans' Court has no power to refuse an order to assign dower upon any other defence than one which would be available at law, viewing it as I do as a Court of Equity only so far as the special subjects of jurisdiction originally committed to it are of an equitable nature, and the forms and methods of proceeding in it are adequate to the examination and decision of equitable questions.

The provision of the act of 1816 giving the Orphans' Court power to lay off a widows's dower in all cases (contemplated by the statute) when she is entitled to it, which Chancellor Ridgely considered an argument in favor of the equity character of the court, I do not regard as meaning anything more than that where there is no valid legal defence, the court may issue its order of assignment as in cases of intestacy.

There is still another view of this question to be considered. It cannot be disputed that the Orphans' Court is no Court of Equity to give a party any equitable relief, as has been before said, it could not entertain a bill by a widow for discovery to enable her, in that court or in a Court of Law, to establish her legal right—her right of dower being a purely legal one. What then can the Orphans' Court do when she presents her petition in it to have her dower assigned? She asks no aid of an equitable nature, but only the issuance of an order of assignment, which the law says she may have upon her application. Is this asking any aid of an equitable nature from an Equity Court? This is a crucial question. Certainly it is not: for the court has no inherent equitable power to grant it, and none of any kind not given by the act of 1816. She, therefore, in no sense calls for *help* from a Court of Equity to establish her title to dower (which could be withheld or granted on condition of doing equity), but only that it may, as the law directs, put in force the same machinery in her case for the assignment of her dower, which it employs every term in the case of widows of intestates. As this is legal machinery—that is created by statute law, and not having any essence or element of equity in it—no bar to its issuance can be allowed in the Orphans' Court, which has no power to give her equitable aid if she should seek it.

For the above reasons my opinion is that the decision made in

this case in the court below was right; and that the appeal should be dismissed.

HOUSTON, J., concurring:

Before the statute of 27 Henry 8, c. 10, commonly called the statute of uses, no jointure settled on a wife, either before or after marriage, could bar her dower at common law. *Vernon's Case*, 4 Rep., 1, because by the rule of the common law a right or title which any one had to any estate of inheritance or freehold, as an estate for life which dower is at common law, could not be barred by acceptance of any manner of collateral satisfaction or recompense for it, but could only be barred by release or confirmation, or by an act which was tantamount to a release or confirmation. And for that reason prior to the statute the wife took both her jointure and her dower at common law on the death of her husband.

But by the enactments of the statute a jointure made before marriage possessing the qualities required by its provisions is declared to be a bar to the widow's claim of dower, for it is expressly provided in the eighth section of it, that if any wife then had, or should thereafter have, manors, lands, tenements or hereditaments unto her given or assured after the marriage for the term of her life or otherwise in jointure (except the same be made to her by act of Parliament), and the said wife should survive her said husband then and in that case she should be at liberty to refuse on the death of her said husband to have and take the lands and tenements so to her given, appointed or assured during the coverture, for the term of her life, or otherwise in jointure, and thereupon to have, ask, demand and take her dower by writ of dower, or otherwise, according to the common law, of and in all such lands, tenements and hereditaments as her husband was and stood seized of any estate of inheritance at any time during the coverture. *Clancy on Husband and Wife*, 212, 213. And the court first ruled the former as a necessary implication from this provision of the eighth section merely, for the statute contains no such express provision as ours does.

And accordingly it was ruled as early as Vernon's case after the passage of the statute in which the jointure was made after the marriage, that if a jointure be made to a woman before marriage,

and be in conformity with the requisites of the act, the wife cannot waive it after the husband's death and take her dower, as she may of a jointure made to her after the marriage, and that by force of the above recited proviso of the statute, for if the provision be made after the marriage, then she is not bound by it, whether it be conformable or not to the requisites of the act, but may after her husband's death waive it and prefer her dower, or might elect to accept and take it in lieu and satisfaction of her dower at her will and pleasure in the latter case, of course. And therefore when made after the marriage her right of election between it and her dower at common law was expressly secured to her by the statute itself.

According to Lord Coke's definition of it one of the requisites to the making of a perfect jointure within the statute, it must either be expressed or averred to be in satisfaction of the wife's dower, and while the statute was never inforce in this State or the territory which now constitutes it, although we find in a few of our colonial statutes some brief and general recognitions of what were then denominated as settlements in the nature of jointures in lieu of dower without any other definition or qualification of them, it is not at all improbable that the early and rigid rulings in the courts of England in regard to that particular requisite, led to the adoption of an express provision to the contrary in our first statute enacted in the year 1816 in relation to devises to wives in lieu of dower, which provides that if any testator shall after the passing of said act devise to his wife any portion of his real estate, such devise shall be deemed and taken to be in lieu and bar of her dower out of the estate of her deceased husband in like manner as if the same was so expressed, unless such testator shall by his last will and testament declare otherwise, any law, usage or custom to the contrary notwithstanding: *provided* that nothing in this section contained shall deprive the widow of her choice, either to dower or the estate so devised, which choice shall be made before the Orphans' Court of the county in the mode prescribed in it. *Digest of 1829*, p. 168.

Under the statute of 27 Hen. 8. c. 10, it was early ruled that a devise by will was no bar of dower, unless it was expressly stated in it to be in satisfaction of dower; but if it was expressed

in the will to be in satisfaction of dower, then it was a bar. *Co. Lit.* 36 b., and after stating in connection with these several other rulings not necessary now to be noticed, Mr. Clancy in his Treatise of the Rights, Duties and Liabilities of Husband and Wife at Law and in Equity, adds, "Such are the various decisions which have been made on the sufficiency of conveyances to constitute a legal bar of dower within the statute of 27 Hen. 8. A distinction must, however, be observed between the operation of a *deed* and a *devise* conveying a provision to a woman as a jointure; if it be a deed the estate conveyed by it may be averred to be for the jointure of the wife, although it be not so expressed in the instrument, but if the land be *devised* by a man to his wife for the term of her life generally, it cannot be averred to be for the jointure of the wife, and in satisfaction of her dower." *Clancy on Husband and Wife*, 212; *Vernon's Case*, 4 Rep. 4. The substantial reason for which was that the whole will concerning lands by the statutes 32 and 34 *Hen.* 8 ought to be in writing, and no averment ought to be taken out of the will which can't be collected by the words contained in the will. And immediately following the passage above quoted, Mr. Clancy further adds, "Another distinction to be observed is between conveyances made of estates in lieu of dower before, and after the marriage has taken place. If the settlement be before marriage, and be in conformity to the requisites of the act, then the widow will be bound by it, and cannot claim her dower; but if the provision be made after marriage, then she is not bound by it, whether it be conformable or not, but may after her husband's death, waive it, and prefer her dower." And in which case she was put, as we have before said, to her election between the two, for she could not have both, no more than a widow in case of a devise to her of any part of the real estate of her deceased husband now under our statute of 1816, can take it and her dower also, with this marked distinction between the two statutes in this respect, that under the English statute it must be declared in the will to be in bar or satisfaction of her dower, while under our statute such a devise of any portion of his real estate is to be deemed and taken to be in lieu and bar of her dower, as if the same was so expressed, unless declared otherwise in the will. And as these are strictly legal enactments by legislative power and authority in both coun-

tries, they constitute the supreme law on the subject in each of them respectively, and therefore it is sufficient to say in all such cases *ita lex scripta est.*

But the defence in bar of dower set up in the case now before this court, is claimed to be an equitable defence purely consisting of an agreement entered into between William McCaulley and Sabilla McCaulley, his wife, after their marriage to settle upon her by their deed of trust through the intervention of Robert Waddell, as her trustee, all the property, real, personal and mixed belonging to her at the time of the marriage, to her sole and separate use, control, management and disposition, as fully as if she were a femme sole, for and during the life time of her said husband, William McCaulley, upon the express condition only that the said Sabilla McCaulley should and would pay all her own debts due from her before said marriage, and renounce all interest in the real and personal estate of her said husband, the said William McCaulley, except what he may give and devise to her by his last will and testament or by deed or other instrument during his lifetime, and when requested by her said husband join with him in any deed or deeds for the conveyance of his real estate or any part or parts thereof, and which covenant he performed by devising to her one-eleventh part of all his real and personal estate in his last will and testament in lieu of her dower, and therein referring to this stipulation of hers in the agreement as warranted by it.

Notwithstanding, however, a jointure settled on a woman previous to her marriage with the intention that it should be a bar to her claim of dower, might be wanting in many of the particulars requird by the statute in England, still it might secure as sufficient a provision for her, as if it were precisely conformable to all the requisites of it, and therefore it would be unjust that a widow in such a case should take advantage of the defect, and have both jointure and dower; and accordingly, to prevent this injustice where such a settlement had been made, a court of equity acting on the consciences of the parties would enforce a compliance with the contract by the widow, and restrain her from suing for dower. Nevertheless, although the 27 Hen. 8, will be so far restrained in its operation, equity in the exercise of this jurisdiction will always attend to the distinction made by the statute itself between pro-

visions settled before and during the marriage; for if they be before marriage the Court following the act, will consider them bars to dower; but, if during the marriage, then the widows will not be obliged to take such provisions in lieu of their dower, but will be at liberty to accept or reject them. And the reason for making widows abide by the provisions settled on them before marriage, and leaving them the power of selection between a provision made during marriage and their dower, seems to be this, that as before marriage they were *sui juris*, and capable of contracting, they shall be bound by such engagements; but as they were incapable of contracting during their marriage, they shall be at liberty after the marriage to choose the provision most advantageous to them. Such is the doctrine laid down by Mr. Clancy on the authority of the cases ruled in England on the subject up to the publication of his work, and which has not been substantially varied from since that time it is believed. *Clancy on Husband and Wife*, 219, 220.

And yet, as I have before said, notwithstanding the statute of 27 Hen. 8, never had any operation or effect, *per se* in this State or the territory now composing it, as the provisions of our colonial statutes, and particularly of our act of 1816, in relation to jointure and devises by testators of any portion of their real estate to their widows in lieu of dower, and the election thereby secured to them in such cases, were evidently derived from that statute, it strikes me that the well established principle and distinction ruled in the Courts of Equity in England between such contracts made by a husband and wife before and during their marriage, apply with even greater force in such cases under our statute than under the English statute, inasmuch as the provisions of our statute in both respects are drawn apparently by design in stricter and more imperative terms than those of the English statute; for while under the statute of 27 Hen. 8 the ruling of the court on the first point that where the jointure was made before marriage it was a bar to the claim of dower and admitted of no election, was by implication merely, nor was anything said in it as to the age of the intended wife, our statute expressly provides in the 3d Section of it in relation to jointure that "If a woman of the age of twenty-one years or upwards, (under the English statutes she may be a minor

still) prior to and in contemplation of marriage, shall, by agreement, accept an estate in, or a charge upon, real estate, to take effect at or before the decease of her intended husband, and to continue during her life, as a provision for her support in lieu of dower in the real estate of her intended husband, such estate, or charge, shall be valid, and shall be a bar to her demand of dower in such real estate." While at the same time the provision in our statute in relation to the "Election of Dower or Devise" is also characterized by increased strictness in the phraseology of it when compared with the corresponding provision in the English statute. It is as follows: "Sec. 5. If a testator shall devise to his wife any portion of his real estate, such devise shall be deemed and taken to be in lieu and bar of her dower out of the estate of her deceased husband, unless such testator shall, by his last will and testament, declare otherwise; but the widow shall have her election either to dower or the estate so devised." And such being the marked difference between the provisions of the two statutes, the better is the reason, I think, why this court in the exercise of the equitable jurisdiction invoked in this case on behalf of the appellants, should be governed by the distinction made in the equity decisions in England between provisions made in lieu of dower before and during marriage: for by the express and positive terms of our statute there are but two methods in which the right of dower given by it may be barred, one by a formal jointure made before marriage as prescribed in the 3d Section, and the other by a devise of some portion of his real estate by a testator to his widow, as prescribed in the 5th Section of it, and which is thereby always made subject to her election after his death.

In support of the equitable defence set up against the claim of dower in this case one of the first authorities to which the counsel for the appellants have referred us, is the case of *Farrow v. Farrow*, 1 Del. Ch. Rep. 457, before Chancellor Ridgely in the Orphan's Court of Kent County, February Term, 1822, but in that case, which was six years after the enactment of our present statute, and when it constituted the only statutory provisions then in force in the State in regard to jointures or devises of real estate and election in lieu of dower, he fully recognized as existing under them in this State the distinction between a contract made before and during

marriage by husband and wife for a collateral satisfaction of her dower in a Court of Equity, as well as in a court of law. For in that case, although the contract between Farrow and his wife was formally made and executed before their marriage, and in contemplation of it, and was to the effect that if it should take place, and she should be the longest liver, that she should have and receive after his death one-third of his personal estate in lieu of and in full satisfaction of her third or portion of his real or personal estate, the Chancellor in announcing his opinion after citing several reported cases referred to by the counsel in their argument, concludes his statement of the law of the case with the following citation: "In *1 Madd. Ch. Pr.*, 355. the law is thus summed up, that any provision, however inadequate or precarious it may be, which an adult before marriage agrees to accept in lieu of dower, will amount to a good equitable jointure." And the same qualification and distinction is thus indirectly, though clearly recognized by him from the beginning to the close of his opinion. In the case of *Davila v. Davila*, 2 Vern., 274, cited by them, the contract was made before marriage. Mr. Davila in consideration of the marriage with his intended wife, and of 1000 £. covenanted if his wife survived him, to pay her 1500 £. in a month after his decease, in full of dower, thirds, custom of London or otherwise, out of his real or personal estate. They were married and he afterwards died intestate and without issue, and his wife filed a bill against his administrator for a moiety of his personal estate under the statute for the distribution of intestate's effects, and the marriage agreement was pleaded in bar, on which the plaintiff contended that it did not debar her from recovering a moiety of the personal estate; or that if she might not have the moiety of the personal estate and the 1500 £. she might have that of the two provisions which was most beneficial. But the Lord Chancellor held that by the words of the agreement she was tied down to accept the 1500 £. in full for what she might claim for dower or thirds, or by the custom of London, or otherwise, out of the real or personal estate. His Lordship therefore allowed the plea.

The case of *Livingston v. Livingston*, 2 Johns. Ch. Rep., 537, is no authority, I think, on the question now before us, because it did not involve a contract or agreement concerning dower or

jointure, but was simply the case of a post-nuptial agreement between a husband and wife, the latter being seized in her own right in fee at the time of their marriage in May, 1809, of a house and lot (No. 56) in Greenwich street in the city of New York, upon which after the marriage the husband had expended in repairs and improvements $2,500. In April, 1814, they agreed that he should purchase another lot in her name and build a house thereon, and that the cost of erecting it should be paid out of the house and lot first mentioned on the sale of it for that purpose to be made when the new house was completed. The bill of complaint filed by the husband stated that in pursuance of the agreement in May, 1814, he purchased a lot (No. 51) in the same street for $6,000, which he paid out of his own money, and for which he took the deed in his wife's name; that he erected a house on it in the building of which he expended more than $16,000 of his own money. That in September, 1815, they went to reside in it, and soon after, on the 21st day of the same month his wife suddenly died, while he with her concurrence was in treaty for the sale of the first mentioned house and lot. That she left two infant children, her heirs at law, to whom the legal estate in both houses and lots descended. The plaintiff alleged that the consideration for the agreement having then failed he was entitled to avoid it and consider the children as trustees for the plaintiff in regard to the second house and lot, and among other relief sought, prayed that the house and lot first mentioned might be decreed to be sold and the proceeds of the sale of it after deducting costs might be applied to reimburse his expenses on the second house and lot. The answer on behalf of the children was by the clerk of the court, and as usual in such cases, was formal merely and admitted nothing as to the agreement, but the facts were proved as alleged in the bill, and the relief was granted and a decree entered for the sale of the house and lot first mentioned for the purpose before stated. The decision was by Chancellor Kent in the year 1817, who considered it as constituting under the circumstances a case of resulting trust in the children to whom the title to both of the houses and lots had descended on the death of the mother, for the benefit of the father who had bought the second lot in her name and built the other house upon it and paid for them with his own money on

the faith of the agreement that as soon as it was completed the first mentioned house and lot was to be sold and the proceeds of the sale thereof were to be applied to the cost which he had incurred in erecting the new house pursuant to it, and which would have soon been specifically completely complied with on the part of his wife, but for the accident of her sudden death while he was with her consent in treaty for the sale of the house and lot as agreed on for that purpose. And I think it worthy of remark that while in that case the just and equitable right and claim of the plaintiff to the relief prayed for was so strong and strikingly manifest, that the wife herself was not in court, as in the case now before us, objecting to or opposing the execution of the agreement after the death of the husband, but on the contrary was fully proved to be all the time consenting to it up to the time of her decease. And yet, as strong and peculiar as the facts and the equitable claim of the plaintiff in that case were, and as long as it has been since it was decided, it seems to stand alone without any other case like it in the books, on the extreme verge of even the jurisdiction of equity over the limited subject of post-nuptial contracts between husband and wife, for although it is referred to and recognized by Mr. Justice Story in his work on Equity Jurisprudence as an authority on that subject in such a case, he classifies it with a few other cases which under peculiar circumstances constitute exceptions to the principles of the common law in regard to contracts made between husband and wife after marriage, "which," he says, "*a fortiori*, apply to pronounce them a mere nullity; for there is deemed to be a positive incapacity in each to contract with the other. But here again," he adds, "although Courts of Equity follow the law, they will under particular circumstances give full effect and validity to post-nuptial contracts." And among the three or classes of adjudged cases referred to for illustration of the particular circumstances under which this has been done, the case of *Livingston v. Livingston* is also included. *2 Sto. Eq. Juris.* Sec. 1372.

But as I have before observed, the agreement in that case was not a contract between a husband and wife for a collateral satisfaction of dower, or a jointure in lieu of it, nor had it any of the elements or features of such a contract, and therefore the ruling in

it can have but little, if any application to the question presented in the case now under consideration. And yet no other case I apprehend, can be found in the books in which even a Court of Equity has held valid and binding a contract of any kind made between a husband and wife after their marriage and substantially decreed a compliance with it against the latter, or her legal representatives after her death.

So in the case of *Liles v. Fleming*, 1 Dever., Eq., 185, the contract was not for a collateral satisfaction of dower, but the husband had before the marriage agreed with the wife that in case there should be a child of the marriage all the property to which she was entitled, either in possession or in action, should be settled upon her, and after their marriage and the birth of a child to them he confirmed it by giving her a written acknowledgment under his hand and seal in the following terms: "Be it known to all whom it may concern, that I, Jacob Liles, of &c., having intermarried with Frances Holland, widow, &c., and by her having had one son called Richard Liles, I do hereby certify that all the property which came by my said wife of every description I give to her and her heirs forever." The bill in equity was by the wife against his executor and others after his death, and her claim was for personal property and money exclusively which she had at the time of the marriage, consisting in part of slaves, several of which he had bequeathed by his will to his children by a former marriage, and in it had made a very small provision for the plaintiff who had formally entered her dissent from it. The prayer was to have the defective instrument set up, and also for a distribution of the assets of the testator pursuant to the statute. The defendants in their answer put the plaintiff to the proof of the ante-nuptial agreement, and insisted if it was made that the plaintiff should be put to her election, contending that she could not claim under the agreement, and also her distributive share of the testator's assets. But the court held upon the evidence and the proof specially referred to and stated in the opinion that the testator had declared and admitted that he had executed the paper in pursuance of his engagement entered into with her before the marriage, she was not to be put to an election, but was entitled to take under the agreement, and also her distributive share of the assets of the testator.

It is therefore manifest that the agreement in that case was not even a post-nuptial agreement pure and simple between a husband and wife to settle all the personal property owned by her at the time of the marriage on her in a certain specified event which afterwards occurred, much less a post-nuptial contract for a collateral satisfaction of a wife's claim of dower in the whole of her husband's real estate.

But I will state in order to show that *Livingston v. Livingston* is not considered under the particular circumstances of that case an authority in the State of New York on a post-nuptial contract between husband and wife similar to the contract in the case before us, that is to say, for a collateral satisfaction of her right of dower or election under the statute of that State. I will refer to a recent case in the Supreme Court of that State in which it was decided that an agreement by a wife in articles of separation to release her dower in her husbands lands, will not discharge them therefrom, unless she elects to ratify the agreement after his death. Although she accepted and had been for many years during his life time, and still was since his death, in the enjoyment of the pecuniary provision for her maintainance therein given, she is not estopped from claiming dower after her husband's death. The wife cannot release to her husband her dower right directly or indirectly. *Gridet v. Brown*, 3 Abbott's New Cases, 295. By the articles of separation the quiet and undisturbed possession of the sum of three thousand dollars paid to her trustee named in them, and all her personal property of which she was then or might thereafter become possessed with the right to dispose of the same, as though she were a feme sole and unmarried, were guaranteed to her, and which she agreed to accept in payment and satisfaction of all and every claim on her part for or by reason of her intermarriage with him, for alimony, dower, right of dower or otherwise, and thereby released the lands whereof he was then seized from all dower and right of dower, and also all claim of dower in and to any land he might thereafter become seized of, and covenanted upon request to execute in the future and deliver to such person or persons as he or his heirs, executors or administrators might direct all necessary conveyances for the more complete release of any dower or claim of dower therein.

The action was against her and others for partition of lands of which her late husband was a partner owner at the time of his death, and the only subject of real contention in it was whether she should have dower in so much of the land as might be set off as the share of her deceased husband in it, and the court held that as far as the instrument purported to release her dower to her husband it was a nullity. *Carson v. Murray*, 3 Page, 483. That could only be done in law by her uniting with her husband in a conveyance of the land to a third party as provided for by statute. But it was urged in opposition to her claim of dower that she was equitably estopped by the agreement and the provision which she had received and enjoyed; or if not, that then the case came within the provision of the revised statutes of that State that "If a pecuniary provision be made for the wife in lieu of dower, she shall make her election whether she will take such pecuniary provision, or be endowed of the lands of her husband, but she shall not be entitled to both. The court, however decided against both of these equitable defences and said that in order to put the wife to such election the pecuniary provision alluded to must in some way, by last will or otherwise, be tendered to her at the death of her husband, or in other words, as was held in the case of *Crain v. Cavana*, 36 Barb., 410, "that this equitable provision to bar dower must be a provision to take effect in possession or profit immediately on the death of the husband." And the judgment was that Mary Ann Brown, the widow of the deceased husband, John D. Brown, was endowed of the land in question. The case of *Livington v. Livington*, it is true, was not even cited or referred to in that case by either the counsel or the court, but that could have only been because no one considered it to have any application to a contract for a collateral satisfaction of dower under the express provisions of the statute of that State.

The two American cases of *Livingston v. Livingston* and *Liles v. Fleming and others* were each decided on their own particular circumstances, and although neither of them involved the question of an equitable bar of the legal right of dower in real estate, they have each gone further perhaps, than any other case cited in compelling compliance with post-nuptial contracts between husband and wife in courts of equity, but the justice and equity of the

claim of the complainant under the contract in each of those cases were peculiarly strong and exceptional in their character, and the failure of the relief asked for in either of them would certainly have been not only against equity and good conscience, but grossly unjust and inequitable to the complainant under the particular circumstances. But I must say that I have been unable to discover in the facts and circumstances of the case now before us any such analogy in principle to those cases, or any such injustice, hardship or wrong to the husband or his legal representatives to result from the failure of the contract in question, as would warrant a court of equity in compelling a compliance with it by the wife after his death against her will and consent, and the express election which she has since made in the court below under the provisions of the statute in such case made and provided.

The State of Delaware, *ex. rel*, DAVID M. RICHARDSON *v.* WILLIAM H. SWIFT, President of The Diamond Match Company.

Mandamus—Jurisdiction of Court—When Granted.

The writ of mandamus is an appropriate remedy for the enforcement of private rights where there is no other adequate remedy. The right to use it must first be obtained from the proper court, which has a discretion, but not an arbitrary discretion, in granting it.

A stockholder in a private corporation has such an interest in it and its affairs as will entitle him to an inspection and copies of its books, papers and accounts on reasonable and proper occasions, and when they become material to him as evidence in a suit with another. When this right is denied him by the company, or any of its agents having the custody of said books, there being no other specific remedy, a writ of mandamus will issue to enforce the same.

A foreign corporation, holding property and doing business within this State, is considerated and treated as a domestic corporation, having the same rights and protection in the carrying on of its business and enforcement of its contracts, and being subject to the same duties and answerable to the same tribunals and in a similar manner, as domestic corporations.

A non-resident stockholder of a foreign corporation, said corporation owning property and doing business in this State, has a right to inspect and make copies of the books of said corporation for use in a suit in another State, they being in the custody of its president residing in this State, and is entitled to a writ of mandamus for the enforcement of said right against said president, he being within the jurisdiction of this court.

(*New Castle, February 17, 1885.*)

MANDAMUS.

This was an application by David M. Richardson, the relator, a resident of Michigan and a stockholder in the Diamond Match Company, a corporation of Connecticut, owning property in this State, for a *mandamus* to compel William H. Swift, a resident of this State, its president, who had possession of certain books and papers belonging to the company, to allow relator to make copies thereof.

These copies were wanted by Richardson for use in certain legal proceedings in the State of Michigan, brought by him against Christian H. Buhl and Russell A. Alger of Detroit, to restrain them from selling certain stock of the Diamond Match Company, which he claimed.

This stock had been pledged by Richardson to Buhl and Alger in 1879, and 1880, to secure them against loss by reason of certain

indorsements on his notes and as sureties on his bond, under an agreement that Buhl and Alger were to receive a proportion of the net earnings of the stock, and not merely the dividends declared on the same; that on settlement no loss that might be charged on account of the purchase and sale by the company of other match factories should be taken into account; that the earnings were to be estimated from the trial balances of books of the company, and allowance to be made for loss or shrinkage in value of the property of the company, and consideration taken of the improvements made out of the earnings.

Richardson paid his notes and the bond was discharged, but Buhl and Alger refused to deliver the stock to him, claiming that there was still a large balance due them for net earnings of the company during 1881 and 1882. On their proceeding to sell the stock, Richardson brought a suit for an injunction against them, and for use in such suit applied to Swift, as president of the company, for copies of the books in order to show the true net earnings during that time and what deductions from the earnings were proper to be made on account of loss and shrinkage of the property, and what sum should be charged for improvements and expenditures necessary to be made in order to enable the company to make such earnings and profits.

Swift allowed Richardson to inspect the books, but refused permission to make copies; whereupon, Richardson applied to this court for a writ of *mandamus* to compel such permission.

It was stipulated that if the court should be of opinion that the writ should be granted, a peremptory and not an alternative writ should issue.

W. C. Spruance, William M. Lillibridge and ——— *Lothrop* for the relator:

I. It is a settled rule of law that shareholders or corporators are entitled, as a matter of right, to inspect and take copies of the books and papers of the corporation, at all reasonable times. They are the best evidence of the facts contained in them, and are equally the property of all the corporators.

1 Redfield on Railways, 227; *1 Dillon Mun. Corps.*, § 240;

Rex v. Hostmen, 2 Strg., 1223; *Gery v. Hopkins*, 7 Modern, 129; *Rex v. Shelley*, 3 T. R., 141, (1789); *Mayor v. Graves*, 8 T. R., 590.

II. Mandamus is not confined to matters relating to public rights or duties, or to public corporations, but is the appropriate remedy in many cases relating to private corporations.

Woods on Corps., §464; *Rex v. Wildman*, 2 Strg., 880; *Am. Railway Frog Co.*, 101 Mass., 398, (1869); *St. Luke's Church v. Stack*, 7 Cush., 226; *State v. Goll*, 3 Vroom, (N. J.), 285; *Rex v. Worcester and Birmingham Canal*, 1 Mann. & Ry., 529, (1828); *Kentucky v. Dennison*, 24 Howard, 66 (1860); *Commonwealth v. Phœnix Iron Co.*, 23 Am. Law Reg., 388 (Sup. C. of Pa., 1884), and cases hereafter cited; *High Ex. Rem.*, §277; *Rex v. March*, 2 Burroughs, 999; *White's Case*, 2 Ld. Raymond, 1004; *Prieur v. Bank*, 7 La., 509; *State v. Chamber of Commerce*, 20 Wisc., 73.

III. The writ of mandamus will be granted to a corporator to enable him to inspect books and papers of the corporation in case such inspection is necessary in reference to some matter in dispute between him and other corporators, or between the corporation and its members.

Angell & Ames on Corps., p. 647; *High Ex. Rem.*, Sec. 306, Secs. 308, 310; *1 Dillon Mun. Corp.*, Sec. 240; *Wood's Field on Corps*, Sec. 464; *King v. Lucas*, 10 East, 235 (1808); *Rogers v. Jones*, 5 Dowling & Ryland, 484 (1825); *Rex. v. Merchant Taylors Company*, 2 B. & Ad., 115 (1831); *People v. Cornell*, 47 Barb., 329; *People v. Pacific Mail S. Co.*, 50 Barb., 280; *People v. Lake Shore & Mich. R. R. Co.*, 11 Hun., (18 N. Y.) 1, (1877); *People v. Throop*, 12 Wend., 183.

Peremptory mandamus granted to a director and stockholder of a bank to compel the cashier to allow inspection of the books of the bank.

Commonwealth v. Phœnix Iron Co., (In Sup. Court of Pa.), 23 Am. Law Reg., 388, (1884); *Burton v. Saddlers Co.*, 31 Law Journal, Q. B., 62; *Cockburn v. Union Bank*, 13 La. Annual, 289; *Martin v. Bienville Oil Works*, 28 La. Annual, 204.

Mandamus granted to a stockholder to inspect books and papers of the corporation.

State v. Accommodation Bank, 28 La. Annual, 874; *People v.*

Walker, 9 Mich., 330, 96 U. S., 79; *People v. Underdon*, 1 Howard's, N. Y., Prac. R., 247.

IV. The right of a corporator to mandamus to enable him to inspect books, &c., of the corporation is subject to certain reasonable qualifications, e. g., it will not be granted to gratify idle curiosity, or upon merely speculative grounds. *High Ex. Rem.*, Sec. 310; *Wood's Corps.*, Sec. 464; *Rex. v. Merchants Taylors Co.*, 2 B. & Ad., 115; nor unless the relator has made a proper demand on the proper parties having the custody of the books, &c., and was refused permission. *High Ex. Rem.*, § 310; *People v. Walker*, 9 Mich., 328; *Rex. v. Wilts Canal Co.*, 3 Ad. & El. 477.

V. It is not a good ground for refusing a mandamus that the books, &c., are books of account between the corporation and its stockholders, and therefore should be regarded as confidential, or that they *might* be used for purposes not strictly proper.

Wood's Corps., § 464; *People v. Pacific Mail*, 50 Barb, 280.

VI. The directors of a corporation have no right to pass a resolution excluding one of its members from an inspection of its books, although they believe him to be hostile to the interests of the corporation; and such resolution furnishes no sufficient ground for an officer of the company, having the custody of books, refusing to allow a member to inspect the same.

People v. Throop, 12 Wend., 183; *1 Redfield on R.*, 228.

VII. Where an inspection of corporate books and records is sought, the writ should be addressed to the one actually having the custody of the books and records, even though he is merely a ministerial officer acting under the direction of others, as a bank cashier.

High Ex. Rem., §311, §545; *Wood's Corps*, §466; *People v. Throop*, 12 Wend., 183.

VIII. This court has jurisdiction to enforce by mandamus the right of a stockholder to inspect and take copies of books and papers of a foreign corporation, in a case where such books and papers, and the person having them in his possession or custody, are within this State, and such corporation owns property in, and is engaged in carrying on business in this State.

State of Nevada ex. rel. Curtis v. McCullough, 3 Nevada, 202.

IX. Where a corporator has the right to inspect books of the company, he has also the right to make copies.

Cotheral v. Brouwer, 1 Seld. (N. Y.), 562.

X. Where the rule to show cause why a mandamus should not issue is too general, the Court will mould and restrict it so as to meet the justice of the case.

King v. Leicester, 4 Bar. & Cr., 891.

XI. An application for mandamus is addressed to the *judicial discretion* of the Court; but if a party shows himself entitled to the writ, and it is refused, a writ of error will lie.

Wood's Corps., § 456; *St. Luke's Church v. Slack*, 7 Cush., 239; *Commonwealth v. Pittsburg*, 7 Norris, (Pa.), 66; *Commonwealth v. Fischer*, 3 Harris, (Pa.), 251.

George Gray and *Benjamin Nields*, for defendant:

This is not a proceeding against any property lying or being within this State. It is not in any respect a proceeding against "The Diamond Match Company," the corporation. It is not in any sense a proceeding *in rem*, but is essentially a proceeding *in personam*.

No valid judgment or order *in personam*, can be pronounced or made by any judicial tribunal, until it has first obtained jurisdiction of the person against whom the judgment is pronounced or made, and such jurisdiction can only be obtained by the ordinary process of the Common law, or what is equivalent thereto, in our State Constitution, "remedy by due course of law."

Before the writ prayed for or before any personam can lawfully issue, this court must have jurisdiction of the person against whom it does issue, viz: William H. Swift, President of The Diamond Match Company.—That this court can have jurisdiction by proceeding *in personam* over William H. Swift, as an individual, by *due course of law*, we do not deny. But that it can have jurisdiction over William H. Swift, as an officer of The Diamond Match Company, a corporation created and existing under the laws of Connecticut, unless he voluntarily submits to its jurisdiction, we do deny.

A corporation does not exist until created by positive law.

It exists only by form of law. When created its rights are only such as the power creating it may confer upon it. It owes its vitality to a legislative act, and its life, or duration continues only so long as the law of the State creating it may determine that it shall continue.

Trustees of Dartmouth College v. Woodward, 4 Wheaton, 518, 636.

All corporations are created in theory for the benefit of the general public of the State creating them,—for the public good of the State.

"The objects for which a corporation is created are univer-"sally such as the government wishes to promote. They are "deemed beneficial to the country; and this benefit constitutes the "consideration, and in most cases, the sole consideration of the "grant."

Trustees of Dartmouth College v. Woodward, 4 Wheaton, 518.

No State, excepting the State under whose laws the corporation was created and exists, can enlarge or diminish the rights, powers or properties which the charter of its creation confers upon it, nor renew, or continue its vitality in a foreign State after its charter has been extinguished in the State creating it.

"A corporation can have no legal existence out of the Sovereignty by which it is created, as it exists only in contemplation of law, and by force of the law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not follow that its existence there will not be recognized in other States."

Runyan v. Coster, 14 Peters 122-128; *Bank of Augusta v. Earle*, 13 Peters 519-588.

"It may be safely assumed that a corporation can make no contracts, and do no acts either within or without the State which creates it except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner, as the charter authorizes."

Baily v. Phila.; *Bank of Augusta v. Earle*, 13 Peters, 519-588.

Blackstone Manufacturing Co. v. Inhabitants of Blackstone, 13 Gray, 488.

The Act of the General Assembly of Delaware did not make the Diamond Match Company a Delaware corporation. The Act is as follows:

AN ACT TO ENABLE THE DIAMOND MATCH COMPANY TO HOLD REAL ESTATE.

Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met: That the Diamond Match Company, a corporation of the State of Connecticut be, and it is hereby authorized to take and hold in fee simple, in New Castle county, and State of Delaware, such real estate as may be necessary for the purpose of carrying on the business of the said corporation, and also to sell the said real estate, or any portion thereof in fee simple when no longer needed for the said corporation. Passed March 8, 1881. (Private Act Record B, 1, 504).

It is an enabling Act and renders the corporation no further amendable to the laws of the State, nor entitled to its privileges, than any other foreign corporation.

Blackstone Manufacturing Co. v. Inhabitants of Blackstone, 13 Gray, 488; *Merrick v. Van Santvoord*, 34 N. York, 218.

This corporation cannot be sued in Delaware, nor any action taken against it in this State, excepting such action as is provided by the statutes of this State.

McQueen et. al. v. The Middletown Manufacturing Company, 16 Johns, 5; *Pickham v. North Parish in Haverhill*, 16 Pickering, 274-286; *Hulbert v. The Hope Mutual Insurance Co.*, 4 Howard P. R. N. York, p. 276; *Barrett v. Chicago and Lake Huron R. R. Co.*, Supreme Court, 4 (Hun.) Rep., 114; *Whitehead v. Buffalo and Lake Huron R. R. Co.*, 18 Howard P. R. N. York, 218.

The law of Connecticut requires that the town within the State shall be named, in which the corporation is to be located. Under and pursuant to that law, "The Diamond Match Company" is located in the Town of New Haven, County of New Haven, and State of Connecticut.

McCall v. Byram Manf'g Co., 6 Conn., 428 ; *Statute of Conn.*, 1881.

The law further designates the officers of the corporation on whom notices, in legal proceedings, may be served. Service on the President, within the State of Connecticut, would not be a legal service on the corporation.

The law commands that the *statements* and *books* of every such corporation shall be kept in the town where it is located, &c. Which books and statements, we submit, must include and show all of the transactions of every nature and kind relating to the business of the corporation, including those named in the relator's petition, and all of these statements and books pertaining to the business transactions of this corporation are at New Haven, there open for the inspection, at all reasonable times, of David M. Richardson, and of the other stockholders. Under the terms of the law, they cannot be at any place, other than New Haven, for the purpose of inspection. If they are not there, then a law of the State of Connecticut has been violated, and the State of Connecticut has provided by law a penalty for such violation, and the courts of that State and that State alone, can impose the penalty prescribed by the act, or administer such other remedy or relief as the laws of that State may make appropriate. This Court will certainly not attempt to enforce a law of Connecticut relating to and governing a corporation of that State, nor will it impose on such corporation the provisions of any other law than that under which it exists, and is controlled.

It may, however, be contended that William H. Swift, as President of this corporation, having certain books, instruments, papers, &c., in his custody, that such books, &c., are property of the corporation within the jurisdiction of this Court.

The answer to such contention is, that such books, instruments and papers have no commercial or market value, and are not such property of a foreign corporation as the courts will intervene to protect for the benefit of creditors, and that the Courts will only intervene to protect the property of a foreign corporation for the benefit of the citizens of a State within which a foreign corporation has been transacting business respecting contracts *made in such States with such corporation* relative to such property, and when such

citizens would be remediless in the State where such corporation exists.

And further, this is not, as before stated, in any sense a proceeding against the property of this corporation—a proceeding *in rem*, nor is it a proceeding against the corporation to require *it* to comply with any law of its charter, or keep any promise, or perform any contract or agreement.

The relator, David M. Richardson, is not a citizen of this State; he owes no allegiance to this State; he is not here claiming that because this State enabled this corporation to hold land here, and by comity allows it to transact business here, and that he, as a citizen of this State, would be injured; he is not seeking to enforce any contract in this State; is not a creditor of this corporation; is not seeking to make any property of this corporation applicable to the payment of any claim or debt he has against it, but is asking this Court to command the president of this corporation, to permit him, here in Delaware, to examine and make copies of its books and papers, when he has a full and complete remedy in the State of Connecticut, where the corporation exists. And we respectfully submit, that if he has not a remedy under the laws of Connecticut, then this court has not the power to supply him with one.

Howell v. Chicago and Northwestern Railway Co., Barbours, R., vol. 31, 378.

In England, a writ of Mandamus is, in general, a command issuing in the King's name, from the court of King's Bench. 3 Blk., 110.

In the United States, it may be defined to be a command issuing from a common law court of competent jurisdiction, in the name of the State. H. Ex. leg. R., 4.

It is directed to,

1st, Some corporation or,

2d, Some public officer or,

3d, Inferior Court,

requiring

The performance of a duty therein specified, which duty results from,

1st, The official station of the party to whom the writ is directed or,

2d, From operation of law, *i. e.*, obligations imposed by law upon the respondent specifically. Ibid, 4.

Cannon, et al., v. Janvier, 3 Houston, 27.

A Mandamus does not confer power, but merely enforces the exercise of power already existing, where its exercise is a duty.

Boone on law of Corporation, Sec. 156.

Mandamus is a writ commanding the performance of some act or duty therein specified in the performance of which the applicant for the writ is interested, or by the non-performance of which he is aggrieved, or injured. It is always to do some act in execution of law. The object of a mandamus is to prevent disorder from a failure of justice and a defect of police. High, 4.

Legget, et al., v. Mayor, &c., of Annapolis, 42 Md., 226.

To entitle a party to the writ of Mandamus, two things must appear; first, that he has a legal right to have something done by the party to whom he seeks to have the writ directed, and which has not been done; and, secondly, that he has no specific legal remedy to which he can resort to compel the performance of that duty.

It must also appear that the defendant yet has it in his power to perform the duty required of him. For the Court will refuse the writ if it be manifest that it would be vain and fruitless.

The People ex rel. Alexander H. Bailey v. the Supervisors of Greene, 12 Barbour's Supreme Ct. Rep., 217.

But as simply a preventive remedy, it has never been used, so far as we have been able to discover. The nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and defect of police.

Legget et al. v. Mayor, &c., of Annapolls, 42 Md., 226; *People ex rel. Mott v. Bond,* Sup. 64, N. Y., 600–604; *People v. Croton Aqueduct Board,* 49 Barbour, 259–564.

What are the duties of the President of this corporation? Nowhere does the law require him to take charge of the books and papers pertaining to the business of the corporation. Nowhere does it make it the official duty of the president to exhibit the

books and papers of the company to the stockholders. It is no part of his official duty to take charge of these books and papers and exhibit them to the stockholders of the company.

If the fact should appear that the books are in the hands of the wrong man, and are at the wrong place, then no Court can compel the person thus holding them to perform an official act in relation to them, that is, exhibit them to the stockholders of the Company, &c.

The rule is that the writ shall be directed to him who is to do the thing required to be done.

The People v. Throop, 12 Wend., 183.

The office of the writ is to compel the performance of a duty enjoined by law, and it cannot be employed to compel the doing of an act which the person, or officer, has no legal right to do, without the writ. It neither confers power, nor imposes duty, but it is a command to exercise a power already possessed, and to perform a duty already imposed.

Lowe v. Phelps, Court of Appeals of Kentucky, 8 Reporter, 498; *Reporter*, Vol. 12, p. 227.

If William H. Swift, as President of the corporation, should attempt to take the books and papers, named in this petition, from the town of New Haven to Detroit, there to exhibit them on this suit, the courts of Connecticut could lay hands on him, and prevent him from doing any such thing.

It has often been said by Lord Mansfield that a mandamus was a very beneficial writ, and the best method of preserving it, was to be sparing in the use of it.

King v. Bristow, 6 Term, 1795.

The writ can only properly issue to command the doing or performing some act or duty in execution of a legal obligation.

Tappeng on Mandamus, p. 10.

A mandamus will not be granted to command any person to exercise a jurisdiction which that person is not most clearly and certainly *appointed to*, and bound by law to exercise (*Rex v. Middlesex*, 9 A. & E., 540), for the court will not grant such writ, except it clearly see that there is a power lodged in the person against whom the mandamus is prayed.

Tappeng, p. 11, 12, 17, 131, 132; *King v. Blear*, 4 B. & C.,

901; *Rex v. The Gov. Comp. Bank of England*, 2 B. & Ad., 620; *The People v. Thump*, 12 Wend., 181–183; *Sellers v. Phœnix Iron Co., Am. Law Reg.*, June, 1884.

When the law does not provide for the inspection, the Courts have not the power to demand an inspection.

If the Court abide by the rules of pleading, then the absence of all pretense that there is any duty imposed by law, charter, or by-law, on William H. Swift, President, is admitted, because it is no where averred to exist. No specific duty by charter, and no statute giving the right as against him, are anywhere mentioned, in the relative petition, or his exhibits.

If it is the right of this relator to have these books and papers exhibited to him, that he may inspect them and make copies of them, then we submit that it is a corporate, that it is the duty of the corporation to produce them, and that this proceeding should have been against the directors and officers of this corporation, and not against an individual member of it. In the case of *Sellers v. Phœnix Iron Co.*, the petitioners had to amend their bill in order to make the directors and officers parties.

At law, contradistinguished from equity, it is a universally recognized rule that a corporator has no other rights in the property of the corporation or in its management than is given by the charter.

If the writ is of grace, then of course a reasonable ground must be laid. That this must be a *corporate* duty, if the right exists, is shown thus.

If the charter or by-laws do not require some particular officer to do the act, then if it is an act that must be done. the writ goes against the corporation and not against any officer, even though when the act is done, it must be done by some person.

2 Salk., 700; 1 Strange, 55; *Phillips v. Comth.*, 98 Penna., 401; 10 *Howard Pr. Rep.*, 542; *The People ex rel. Jenkins, &c., v. The Parker Vein Coal Co., &c.*

Houston, J.:—On the facts alleged and not disputed in this case, I have no doubt upon the general principle involved in it, and the authorities cited in support of it, both in this country and in England, that a stockholder in any joint-stock company, or pri-

vate corporation incorporated for manufacturing or trading purposes, has such an interest in it and its affairs, as will entitle him in law to an inspection and copies of its books, papers and accounts on reasonable and proper occasions, and when they become material to him as evidence in a suit with another, and this right is denied or refused him by the company or any agent or officer of it having the custody of them, and there is no other specific remedy for it, the right may be enforced by a writ of mandamus from any court having jurisdiction and authority to issue the writ in such a case.

Originally in England, from which country we have derived it in this State, it could only be issued by the Court of King's Bench, and is thus defined by Lord Mansfield: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions when the law has established no specific remedy, and where in justice and good government there ought to be one." "If there be a right, and no other specific remedy, this should not be denied." *Rex v. Baker et. al.* 3 Burr., 1265. And the fact that by the recent Common-Law Procedure Act, 17 and 18 Vict. c. 125, it is provided that any party requiring any order in the nature of specific performance, may commence his action in any of the Superior Courts of Common Law in Westminster Hall, except in replevin and ejectment, and may indorse upon the writ and copy to be served that he will claim a writ of mandamus, and may renew the claim in his declaration, and if the writ is awarded in the final judgment in the case, it will issue peremptorily in the first instance, certainly shows that it has lost none of its importance and utility in the estimate of later times. The form of this statutory mandamus is very brief, and its execution is enforced by atttachment.

By the second clause of Section 3 of Article 6 of the Constitution of this State, it is ordained that the Superior Court shall have jurisdiction of all causes of a civil nature, real, personal and mixed, at common law, and all other the jurisdiction and powers vested by the laws of this State in the Supreme Court or Court of Common Pleas which were wholly superceded by it under the present amended constitution, and by statute, it is also provided that the Judges of the Superior Court, or any two of them, shall hold pleas of assize, *scire facias*, replevins, information and actions

on penal statutes; and have and determine all and all manner of pleas, actions, suits, and causes, civil, real, personal and mixed, according to the Constitution and Laws of this State, as fully and amply, to all intents and purposes as the justices of the King's Bench, Common Pleas, and Exchequer in England, or any of them, may or can do. * * * * And generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted them, concerning the premises, according to law and equity, as fully and amply, to all intents and purposes whatsoever, as the justices of the King's Bench and Common Pleas, at Westminster, or the Chancellor of England, may or can do. *Revised Code Amended*, Chap. 92, Secs. 1 and 2, p. 564. And it is under these comprehensive grants of jurisdiction and powers that this court is vested with authority to issue and enforce the writ of mandamus in this State, as it existed at common law and was recognized by the Court of King's Bench in England, and for the like purposes of remedial justice when the grants were so made.

Its original quality or characteristic of a prerogative writ upon the theory that it proceeded immediately from the King himself by virtue of his peculiar sovereignty in such a case, never could have existed in this State under any constitution adopted by it, and therefore, it at once became in this State a common law writ in relation to the particular cases to which it was applicable, a writ of right, but not of course, because it could only be obtained and sued out on a special application to the court in term time on a statement of the case supported by affidavit and *prima facie* sufficient to entitle the applicant to the remedy afforded by it; and which was also originally the case with even that still more valuable and important writ of right, the writ of *habeas corpus* at common law, until by the great Statute of Charles II, made it issuable at any time, in vacation as well as term time, although it must still be specially applied for and supported by affidavit when made to the court in session or to a judge of the court in vacation.

This case, however, has been to me a novel and more embarrassing one on account of another aspect in which it has been so cogently presented to us by the counsel for the defendant, and that is, that with all the power vested in this Court to issue this writ

within the limits of this State and against any officer of a joint stock corporation chartered by the State and holding his office and residing in it, in such a case as this, we have no power to issue it against the defendant in this case, the President of the Diamond Match Company, because it was not incorporated by the Legislature of this State, but by the Legislature of the State of Connecticut, notwithstanding it is admitted by them on the record that he is the President of the Corporation and resides in this State and city, and has in his possession and custody as such, the books and papers of the Company in question, and has refused on his demand therefor to allow the plaintiff to inspect and take copies of them, and that such residence of the President in this State is not inconsistent with the charter of the corporation of the law of Connecticut, and that his refusal to allow the plaintiff to inspect and take copies of the books and papers of the company in his possession and custody as such in this State is expressly sanctioned and approved by the corporation. It is also admitted that the corporation has been and is still doing business in the manufacture and sale of their friction matches in this city, and has even been directly recognized as such a corporation of the State of Connecticut lawfully and rightfully pursuing the business in the State, by a special act of the Legislature of this State, passed on the 8th day of March, 1881, as follows: "That the Diamond Match Company, a corporation of the State of Connecticut, be, and it is hereby, authorized to take and hold in fee simple, in New Castle county and State of Delaware, such real estate as may be necessary for the purpose of carrying on the business of the said corporation, and also to sell the real estate, or any portion thereof in fee simple when no longer needed for the said corporation." It is neither allowable or necessary, I think, to consider that this made it in effect a corporation of the State of Delaware. All I mean to say on this point is that it constitutes an express recognition, not only of its existence as a corporation of the State of Connecticut, but also of its right, as such, to hold real and personal property in this county and to carry on its business in this State; and that the company therefore enjoys these corporate rights and privileges within our limits, not by that implied recognition and comity merely which now prevails so generally among all the states of the Union with respect to such cor-

porations, but by the express grant of the Legislature of the State.

But of the right of the relator to the evidence which, as a member and stockholder in the corporation, he seeks to obtain within the limits of this State, for the vindication of his rights and the due administration of justice in a suit between him and others in another of our sister States be conceded, as I think it must be, what is there in the nature of the writ of mandamus as it exists, and has always existed in this State under the laws and constitution of it, that forbids this court under the facts and circumstances presented in this case, to order the issuing of it, provided the court is satisfied that there is no other specific remedy for the legal enforcement of that right? The answer to this question by the counsel for the defendant is not sufficient in this case in my opinion, because it proceeds, I think, upon an erroneous idea that there still inheres in the nature of the writ under our laws and constitution, such a peculiar quality or restriction, that it can only issue in such a case as this to a corporation or an officer of it under the law which created it, and in the name of the State which incorporated it, or, in other words, that no other judicial tribunal than the appropriate court in the State of Connecticut under the laws of it, can issue the writ to this corporation, or any officer of it, for any such purpose. For if that be so, then it is manifest whatever may be the legal right of the relator to the inspection and copies of the books and papers and papers in question, that he is wholly without any specific remedy in law to enforce it here or elsewhere; because it is equally certain whether we consider it a proceeding *in rem* or *in personam*, or as partaking of the nature of both, as the writ is to be specifically executed when issued, and both the custos and the books and papers are in this State, that they could not be reached by such a writ from any court in the State of Connecticut. And although that State may have the power which this has not, to forfeit or revoke the charter of the corporation, and that should be done by it, the relator would still be left without his specific remedy in the case, either there or here.

Although our constitution declares that "the style in all process and public acts shall be the State of Delaware," and the writ is issued and prosecuted in the name of it on the complaint of the relator, the jurisdiction and authority of this court to issue it in

such a case, even if this company were a domestic, instead of a foreign corporation, would not eminate or result from the act of incorporation or the by-laws of the company, but from that higher jurisdiction and authority which, as I have before said, the constitution and laws of the State have conferred upon the court in such a case and over the writ of mandamus and all other well known writs at common law within the limits of the State. And we may therefore admit the correctness of the definition of the writ cited by the counsel for the defendant from Mr. Potter's work on corporations, Vol. 2, Sec. 634. "That the writ issues by the command of the sovereign power, and in the name of the State, and is directed to some subordinate court, judicature or body within the jurisdiction of the court from which it issues, and it requires the performance by the body to whom it is directed of a specific act, as being the legal duty of the office, character or situation," without impairing in any degree whatever the truth and soundness of this proposition.

Well now if such be the general and fundamental principles of the law applicable to such a case, and the President of this corporation is residing in this State and City, and where it is now carrying on to some extent its corporate business, and has the books and papers of it in question in its possession and custody now in this State and within the jurisdiction of this court, and refuses to allow the relator to inspect and take copies of them for the purpose demanded of him, I am not able to perceive, after all the consideration which I have been able to give to the case, any good and valid reason for holding that the case is not within the jurisdiction of the court, or that it ought not under all the facts and circumstances alleged and not disputed in it, to award the writ, as prayed in the petition of the relator. The right of the relator to the inspection and copies which he demands being a right founded on the common law of the State by virtue of his being a stockholder in this corporation, and the *res*, or books and papers, as well as the corporate custos of them, being within the jurisdiction of this court, and the same principle of the common law which confers that upon the former, imposes the duty on the latter to grant it, on what principle of law or reason can it be said that the case is nevertheless not within the jurisdiction of the court, because the company was not

incorporated under a law of this State, but under a law of the State of Connecticut, although that right and that duty exists in both States by a law broader and more general than the act under which it was incorporated?

Notwithstanding the number of cases to which we have been referred by the counsel on both sides in the argument of the case, but two have been cited, one on either side, in which this particular question appears to have been involved, and which seem to be conflicting in their rulings upon it. The first to which I shall refer is the case of *The People ex. rel. Jenkins, &c. v. The Parker Vein Coal Co., &c.*, 10 How., Pr. Rep., 543., before Mitchell, Morris and Clerke, Justices, in the Supreme Court of New York, on appeal from an order of special term refusing mandamus. The Parker Vein Coal Company, the defendant, was an incorporation of the State of Maryland. Its charter created it a corporation for the purpose of working mines of coal and iron, and for vending the proceeds of the same, and gave it power to make by-laws and all such rules and regulations as might be necessary for the proper management of its affairs. The capital stock of the company was not to exceed three millions of dollars to be divided into shares of one hundred dollars each, being thirty thousand shares. The officers of the company had issued one hundred and fifty thousand certificates of shares of stock, being one hundred and twenty thousand more certificates of shares of stock than the company by law was permitted to issue, and purporting to represent twelve millions of dollars more capital than the company possessed, or could possess as established and limited by the law of incorporation. In June, 1854, the company was insolvent and made an assignment to Romaine & Darrow of all their property of every description for the benefit of creditors. The plaintiffs were partners engaged as brokers in the purchase and sale of stocks for themselves, and for account of other persons, and had standing in their names upon the books of the company several hundred shares of the capital stock, of which they were the legal holders and owners, and they also held stock certificates in the usual form issued for a large number of its shares of capital stock and signed by its proper officers, of which they were also the legal holders and owners. One of the by-laws of the company required a book or books to be kept

by the company for the transfer of its stock. The corporation had a principal office in the City of New York, and had kept, and then kept at that office books for the transfer of its stock. At the last election of directors of the company, which was after the assignment in June, 1854, the defendants in the cause were elected directors and officers and then had charge of the books; and about the 3d of June, 1854, the officers and directors closed their transfer books, and since that they had refused to permit transfers therein of any of the shares of the capital stock. It was impossible from an inspection of the certificates of the stock to designate which were the genuine, and which were the over-issue certificates. The plaintiffs had applied to the officers and directors to be permitted to transfer stock to persons to whom they had sold it, and had been refused access to the books; and they claimed that the refusal to permit transfer upon the books was of great detriment to them and their business, was injurious to the company and its stockholders, and depressed the market and the intrinsic value of the stock; and they asked for a mandamus to compel the defendants to open the transfer books to them, and to all other stockholders who might desire to transfer stock.

The plaintiffs insisted that it was not denied that their certificates were a portion of the thirty thousand genuine certificates, and also suggested that the one hundred and twenty thousand over-issue certificates having been issued by officers of the incorporation who were authorized to issue certificates of stock, should be deemed genuine certificates.

Morris, J., in delivering his opinion in the case, and after commenting in the strongest terms on the invalidity and illegality of the fraudulent certificates of stock issued by the directors and officers of the company, and observing that if the books should be opened for the transfer of stock, the one hundred and twenty thousand fraudulent certificates could be indiscriminately transferred with the thirty thousand genuine certificates upon the books of the company, and would greatly confuse the evidence in relation to both classes of them, and make it more difficult to trace the false certificates, and to discriminate between the genuine and the spurious, and would enable holders of the false certificates with greater facility to put them in circulation and deceive the ignorant

and confiding, *held*, that the order of the special term before them on appeal should be affirmed and the writ of mandamus denied with costs. And according to the report of it, this seems to have been the ground on which the majority of the three judges decided the case; but *Mitchell, J.*, who concurred in the decision, also announced his opinion in which he held that the plaintiffs were not entitled to the writ because they had an adequate remedy in an action on the case against the company for damages, and he cited several adjudged cases in his own State to show that such a remedy would be effectual and could readily be obtained for the injury complained of, and he then added, "There is also another difficulty in this application. The mandamus partakes of the character of a public writ, one in which the people are in some way interested; and it has never been allowed except for the purpose of controlling those who owe a public duty to the State in which it issued. This company was incorporated in Maryland; and although it has an office here, and may be sued here on its contracts and obligations to individuals, or others, yet it does not owe allegiance or public duties to this State, or according to the laws of this State, but to the State of Maryland, and according to the laws of that State. If it violates its charter, the remedy should be in Maryland and not here. On *quo warranto* its charter could not be taken away here; and while it does not violate any law of our State, the State should not interfere with it." This, however, as it was but the opinion of one of the three members of the court, according to the report of it, the case cannot be considered an authority on that point; nor in any authority cited by him in support of it. But is it not a radical error to assume that because the courts in one State have not the power to proceed by a writ of *quo warranto* to forfeit the charter of a corporation of another State for a violation of it, they have not the power to issue a writ of *mandamus* against it for the specific enforcement of a legal right of a member of it against the corporation, when he has no other specific or adequate remedy for it, and they have by virtue of their general powers, jurisdiction and authority to issue and enforce a writ of mandamus against it in such a case in their own State? It is not by virtue of any obligation of allegiance that a natural person or a corporation may owe to the State of his birth or its creation even, that they are

bound to obey, and are subject to the laws of it, when questions of legal rights and liabilities arise between them and others in courts established for the administration of justice. Although it is denominated a prerogative writ, and must be specially applied for and sufficient grounds shown for it to the satisfaction of the court, it is a common law writ, and in the particular class of cases to which it is applicable by the principles and usages of the law, it is no less so than any other common law writ known to our practice, and the jurisdiction of it and the authority to issue it in such cases was acquired by this court in the same manner as it acquired jurisdiction and authority to issue any other common law writ in a case to which it was by the principles and rules of the common law properly applicable. And if by the laws of this State the case before us be one to which the remedy by writ of mandamus is properly applicable, and the parties to it and the specific subject matter of the suit are within the jurisdiction of the court, can the fact that the property in question, the books and papers to be inspected, belongs to a foreign corporation, or a corporation created by another State, and are in the keeping of an officer or agent of it residing in this State, be any defence in law to it? The same law which confers upon the relator the right to the inspection demanded imposes on the respondent, the agent of the corporation, and on the corporation itself, so far as it is concerned, the liability to it, and neither is conferred or imposed by the terms of its charter, but by the general law of the State where it was created, as well as here under the facts and circumstances admitted in the case.

The other case alluded to was *The State of Nevada ex. rel. Samuel T. Curtis v. H. V. S. McCullough*, 3 Nevada, 202. It arose on an application for a writ of mandamus to compel the defendant, McCullough, to deliver to the relator, Curtis, all the books and papers belonging to the office of Superintendent of The Overman Silver Mining Company, and to admit him to the enjoyment of all the rights incident to the position. The company was an organized corporation under the laws of the State of California, for the purpose of carrying on the mining business in Nevada where the mine of the company was situated. McCullough was elected superintendent of it by the Board of Trustees to hold the office, according to the by-laws, during the pleasure of the board, and en-

tered upon the duties of it, but was afterwards removed from it by the board, and another man by the name of Lambert was substituted, who was also removed, and Curtis, the relator, was appointed. Lambert disclaimed any right, but McCullough refused on demand made to deliver the books and papers of it to the relator, or to transfer the control of the line to him, or to allow him to discharge the duties of the office. The jurisdiction of the court was questioned and denied on the ground that the company was a foreign corporation organized and existing, in the State of California, subject to its laws, and because the appointment of both the relator and the defendant were made in California, and the question of the right of either of them to exercise the powers of superintendent of the company, was cognizable in the courts of California, and because the officers of a foreign corporation cannot be recognized as officers beyond the limits of the sovereignty which creates the corporation. But the court in that case held that it had jurisdiction and the power to issue the writ of mandamus as prayed for in it.

The existence of The Diamond Match Company, as incorporated under the laws of the State of Connecticut to carry on the business in which it is engaged in that and other states of the Union, and for that purpose to erect factories and appoint agents and employ servants in other states, has been expressly recognized by statute in this State, and even without that, its lawful right and authority to do so, if not forbidden by the laws or policy of the State, could not be called in question under the principle of interstate comity in relation to such corporations existing in the several states now so well recognized and established to its fullest extent in this and the other states of the Union. *Bank of Augusta v. Earle*, 10 Pet., 519.

And therefore, notwithstanding the peculiar and unusual character of it, I have not been able to discover, either upon principle or authority, any well founded objection to the jurisdiction of the court, or the redress sought by the relator in this case; and I will further say that as under the liberal and enlightened comity of the states with respect to the incorporations severally created by them, almost all of the rights and facilities for trade and commerce, buying and selling and making contracts in the line of their legitimate business, and of suing on them in the courts of this and other

States, are now as freely enjoyed by the incorporations of other States as by natural persons or partnerships residing in those States, and likewise engaged in a business extending into other States, and with such equality of commercial rights and privileges extended to them, there can be no good or sound reason why the books and papers, and the agent of the company having them in his custody, should in this case be exempted from the jurisdiction of this court and their legal liability to the relator, simply because the company was chartered in another state and is a foreign corporation.

The tendency of decisions in our own courts has long been to consider such corporations when plaintiffs in suits before them, very much the same as they would a natural person from the same State in a like case and position before them, but when the position is reversed, and the interest of such a corporation is on the side of the defendant in the suit, as in this case, even the comity and favor thus extended in the former case forbids that its charter should be used as a shield of defence and a bar to the jurisdiction of the court in it.

COMEGYS, C. J., concurring:—While it might be useful, under circumstances, to inquire particularly into the origin of the writ of *mandamus* and the redress it afforded in the course of the administration of English Jurisprudence, it is sufficient to say, that it has long since ceased to retain its original quality, and has come to be regarded as an appropriate remedy for the enforcement of private rights, *where there is no other adequate remedy.* In that respect, it bears a resemblance to the writ of injunction in Chancery—as to which it is the rule, that if there be adequate remedy at law, it is not to be issued. Similarly, if the party applying for *mandamus* have adequate legal remedy for his wrongs, it will not be granted to him.

In 24 How., 66, Chief Justice Taney, in speaking of the ancient character of the writ, says—"It is equally well settled, that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the

writ, and the power to issue it, have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable." This is the prevailing opinion in the courts of this country, and is that upon which this court has acted in cases requiring its announcement, which have come before it. It is a striking feature of the judicial mind in America, that it is capable of adapting the process of the courts to the furtherance of justice, in cases which require it, where such adaptation is congruous to the nature of the relief desired; as, at a period of great liberality of the legal understanding of England, the action on the case was expanded, beyond the narrow limits which then confined it, and made to be the remedy for the enforcement of all rights for which there was no writ supplied before. *In consimili casu* were the magical words which expressed the idea of appropriate decision. Adherent, however, from their hereditary and necessary conservatism, as the English are, to what may be called fundamental ideas with respect to all the attributes of government; and cherishing them as part of the constitution of the country, especially where (in any respect), the royal prerogative is concerned, the courts there still adhered to the notion, logical however, that the public must in some way be interested in the use of the writ before the Crown could, in contemplation of law, permit of its exercise. Of course, the ingenuity, not to say sophistry, of acute legal minds, could generally discover some cause, affecting the loyal subjects of the realm, which required the putting forth of prerogative power; and thus in many cases, of application for mandamus, the English Courts were compelled to yield to some extent to the doctrines so thoroughly pervading the courts in America, of the writ being as well for private as public benefit. This is the view of the writ taken by *Lord Mansfield in Rex. v. Barker*, Burr, 1267, and quoted by *Blackstone*, 3 Com., 110, "A *mandamus*," says the great judge, "is a prerogative writ to the aid of which the subject is entitled, upon a proper case previously shown to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasion it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and

where in good justice and good government there ought to be one. Within the last century it has been liberally interposed, for the benefit of the subject and advancement of justice. The value of the matter, or the degree of its importance to the public, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied." Afterwards, at page 2186, in *Rex. v. Askew*, he repeated the same idea thus—"There is no doubt that where a party who has a right and has no other specific legal remedy, the court will assist him by issuing the prerogative writ * * "But," he afterwards says, "the court ought to be satisfied that they have ground to grant a mandamus; it is not a writ that is to issue of course, or to be granted merely for asking." This language conveys, with a force and clearness of expression, more characteristic of Lord Mansfield than of any judge before or since his time, as it seems to my mind, the true idea of the quality of this extraordinary legal remedy—a means by which justice can be done, where there is no other adequate means of relief. The impress upon the English mind, made by this strong, precise language, was productive in 1854 of the Common Law Procedure Act, by which, it is said by High, "The law of mandamus and the practice and procedure in administering the relief were entirely revolutionized;" p. 28. In speaking, upon the same page, further about the act, he says, that "the effect of this sweeping enactment has been to place mandamus proceedings upon much the same footing as ordinary personal actions, &c." It was the notion of *prerogative* that prevented the comprehensive language and idea of Lord Mansfield from having their proper weight upon the English mind at the time of their delivery; and therefore, needing an act of Parliament to establish the right to the writ for private ends; but with us, where, in the nature of things, there can be no substance in the thought of prerogative, the mind of American Judges, pervaded by the spirit of a governmental system which treats the citizen as a unit of the aggregate sovereignty, and the different departments of the government and those who administer them, as so many means for the promotion of the general welfare of such aggregate, the writ has been treated (while we acknowledge its origin and original use) as a convenient and also necessary instrument to aid

the citizen in the enforcement of his private right, where, without it, he would be denied adequate redress for his grievances. I may conclude and say, therefore, that, in this State, the writ of mandamus is, although not a *writ of right* (that is, a writ to be issued at the pleasure of the citizen, but the right to use it must first be obtained from the proper court) yet that, being a writ for the enforcement of, or aid in prosecuting, a right where, without it, the party would have no remedy, it partakes so far of the quality of a writ, to be issued *ex debito justitiae*, that no court would be warranted in denying it, where a proper case for its exercise was presented. Though the order for its issuance is discretionary with the courts, as in other cases of so-called prerogative writs, yet the discretion is not an arbitrary one; but using the clear decisive language of this court as pronounced by Judge Black, in the case of *Godwin v. Collins*, 1 Harr., 216, in treating of the discretion of the court in the matter of authorizing amendments of pleadings, "the granting or refusing to grant the application rests in the sound discretion of the court—a discretion to be regulated by the circumstances of the case, and the principles of law settled in relation to like points." Taking that to be the meaning of what should be understood by the term *discretionary* when applied to grant or refusal of the writ of *mandamus*, it is my opinion that if the circumstances of this case show ground for the issuing of the writ, the law requires that it shall be placed within the control of the relator—the doctrine prevailing in this country being in full accord with that above quoted as having been announced by Lord Mansfield.

What are the circumstances of this case, as presented in the petition and answer?

A corporation exists, by a statute of Connecticut, to make and vend explosive matches. In the pursuit of its business, it had occasion to purchase real estate in Delaware in order to enable it to follow it here, with greater facility than it was then doing; accordingly application to the Legislature was made by it for a law; and, what was supposed to be the necessary authority was given by a private act recorded in this county, which is set forth in the pleadings. Acting under this enactment, this company has become the owner of real estate in Delaware, and also carries on a large

business here—not under any provision of positive law, but in virtue of what is a general understanding within this Union—that —corporations created by one of its members shall, so far as certain rights are concerned—for example the carrying on a trading business (as that of this company is) the making and enforcing contracts with reference thereto, &c., be considered and treated as domestic creations, and put upon like footing with them. This is not a matter of right, constitutional or legal; but is consent—that sentiment among the States of our Union, bound together by common friendship and common interest (stronger than any law) which we call comity. It is this which gives to a mere artificial creature, as a corporation is, the privilege, *ex gratia* but not *de jure*, of acquiring a sort of domicile in a state not of its birth, and prosecuting its businesss like a citizen. I am speaking now of States generally. There may be provisions in the constitutions or laws of some of them, which would render the exercise of a corporate right illegal without the requisite legislative authority. But we are not now concerned with a question of that kind. The Diamond Match Company, transacting its business here, supposing that business to be confined to the manufacture and sale of illuminating matches, stands upon the same footing as does any foreign corparation for any manufacture that might be carried on without the necessity of a corporate right which individuals could not, *qua* such, exercise. We have, then, a foreign trading corporation doing business in this State, and having the right (we permitting it to operate here) to ask of us protection in the orderly pursuit of its business, and the use of the process of the law which our citizens employ to enforce their contracts. Having opened the doors of the State (which we had the right to close against it) to this company to enter in at and carry on its trade, we are bound not only by the law of hospitality, but the higher one of justice, to treat it as any creature of our own pursuing like business. States must act "*uberrima fide.*" Where such condition of things exists—concession of the right to trade and to call upon the State, through its courts to enforce its trading contracts, there must, in the nature of things, coexist the correlative obligation on the part of the foreign corporation, to treat itself as subject to the same duties that might be required of one made by domestic law. It seems to me there might

be, in many cases, a great defect of remedy, or failure of justice, if this were not so. I think it ought to be so in the interests of justice—for the promotion of which rightful government can alone exist—and I have no hestation in saying that it is the view of law which should govern this court in all cases appropriate to its application.

It appears that, in addition to the fact, that the Diamond Match Company carries on business here, and possesses real estate for that purpose, the President of its Board of Directors, William H. Swift, the defendant in this proceeding, resides here as a citizen. It also appears that certain books and papers of the company are in this State in his custody and control to some extent as President. It further appears, that the relator is a large stockholder in the corporation, and in the course of his business pledged his certificates of shares and the stock they represented with certain parties in Michigan, (Messrs. Buhl and Alger), as security for certain money advanced by them to him, with the understanding that they should be entitled, if the debt were not duly paid, to apply the dividends of the net earnings of the company applicable to those shares, to the payment of the advances.

It seems that, during a certain period mentioned in the papers, no dividends were declared by the company. The relator has commenced a suit against his pledges in the courts of Michigan to procure a surrender to him of the certificates aforesaid, upon the ground that, in fact, the pledges have received from the company dividends or division of profits, upon the shares they represent, or otherwise, on account of their having them, to an amount exceeding the money advanced by them and interest upon it. He alleges that the books and papers of the company, now in the possession of its President, the defendant here, will show that fact. He further states, that he cannot support his suit without such proof, and that he needs a copy of such portion of those books and papers as will furnish it; that he has applied to such President to allow him to inspect such books and papers and take copies of such portions of them as he needs in his suit; that inspection was granted him, but the privilege of taking copies was denied unless the directors of the company consented—the President promising to consult them. Afterwards, upon request and demand of the right

to make copies, refusal was made, and the ground thereof stated to be that the directors forbade it. This application stands upon these facts, about which there is no dispute.

The objection made to the grant of the application rests upon two grounds. In so stating, I treat all that was said about the nature of the writ, as affecting the action of this court, as being not only unavailable, but as being more historical and explanatory than argumentative. It was certainly, however, admirably expressed every way. Those grounds are, *first*, that this court is without jurisdiction in this case; *second*, that if it have it, a proper case for the exercise of it has not been presented.

These are formidable objections, it must be said; and, in either case, if sustained, are conclusive against the relief prayed for. Let us examine them.

In order to support the claim of jurisdiction, it would be improper to consider this as a contest between the relator and the Diamond Match Company—that corporation as a corporate body not having, from anything that appears, become in any way a party to the controversy between the relator and the defendant, William H. Swift. It is sufficient, as I conceive, for the assertion of jurisdictional power in this court, that the latter resides here, is a citizen of this State, and has in his possession as the chief officer of that corporation, and under his present control, the books and papers, copies of portions of which the relator wants to make, for use in his controversy in Michigan. This evidence he claims is essential to the support of his suit, which cannot go on without it. As the books and papers of a corporate body are the best evidence of its operations and condition, and as that condition within the period stated in the petition and affidavit, is the vital fact upon which the relator's case depends, and there is no law by which the company can be made to produce them in the action in Michigan, it is of the first importance to the relator that he shall have the next best evidence of their contents—examined copies. He can now only get them by an order of this court in the shape of a writ of *mandamus;* for the defendant will not allow copies to be made, and his refusal is the result, as it appears, of the Board of Directors of the company to permit him to give his consent. Whatever the President might be willing to do, his board will not permit the

relator to have access to the books, to obtain the evidence he must have, to prosecute his suit with success.

It is perfectly true, as stated in the argument, that, in contemplation of law, a corporation has its residence, or domicile, using such terms as apply to individual persons, in the State or country of its creation and nowhere else; it being an invisible, intangible creation, existing only by positive law operating only intra-territorially, it necessarily resulted that it had efficiency in the form of its creation and not out of it. This was the original idea of corporations, and hence the proposition asserted so constantly by text-writers and by courts, that they can have no legal existence out of their own jurisdiction. If we are to understand by this that, *propria rigore*, a corporation can do nothing out of the territory of the creating power, then there can be no ground for dispute about it; but when we come to look at what I have before set forth with respect to what we call inter-state comity, it will appear that such proposition must be received with the qualification which such a state of things requires. Looking at the states as integral parts of a homogeneous whole, with governmental interests of a purely common nature, it came to pass, as of course, and for the convenience of each and all, that corporate bodies for trading purposes should, with respect to the end of their creation, be allowed to act and transact everywhere, the same as those of native creations. While, therefore, it is technically true that they have no legal existence out of their jurisdiction; yet, in point of fact, all the States recognize them as, at any rate, entitled to carry on their trades in them, and to sue in their courts for the collection of money due upon contracts with them, and to recover damages for injuries to their property. It is a requirement of the state of absolute free trade between the States, that this should be so. This, of course, is matter of convenience; but it is more, it is in furtherance of the interest of the State, into which another State corporation sends its agents to reside and conduct its business, that it shall not only be permitted to dwell in peace therein, but to transact its necessary affairs without let. This privilege is no right, but is so near akin to it, as to carry with it the usual incidents of a right. And it is so extensive, that what are in fact corporate rights—the right to sue and to purchase and hold property by whatever title are conceded

to it, besides others. While the foreign corporation may not do all the acts authorized by its incorporation, in another State, yet it does many of them, and they, as I have shown, are corporate acts, and not those of mere administration. We must, therefore, not be misled by the unqualified assertion that corporate bodies have no legal existence outside of their creative States. They do exist, qualifiedly, for the promotion of the purposes of their creation; and, while in the non-creating State for those purposes, are subject to the laws of the resident State and liable to contribute, as domestic corporations are, to the public burdens. While this is not such allegiance as a citizen is charged with, yet is all that anywhere a corporation can be said to bear to a political society, except, perhaps, that resulting from the visitatorial power held by a creating State over its corporations. I say, perhaps; for whenever a foreign corporation, for certain purposes, shall abuse its powers in the State whose hospitality it enjoys, to the detriment of the citizens of that State, there would not be wanting reasons why its functions should be examined in the interest of the public welfare. It is not to be thought of, that the favor of the State shall be abused, without check or hindrance. How can it be fairly argued then, that this State has no jurisdiction over this corporation, and that it owes to her no allegiance? Suppose a corporate body should undertake to do any corporate act in the State—by which I mean an act which cannot be done by an artificial body without grant, express or implied; would not the restraining power of the law be put in exercise, or might it not be used, to prevent it? To find out whether under the plea of exercising mere trading powers, others of an unequivocal corporate nature were being used, would it not be competent to put the machinery of the law of a State in operation for the purpose? Undoubtedly. There is a well known preventive remedy, which would be called into action, and put in force, if a proper case should be presented. If then, the foreign corporation, or its agents, or servants, can be reached, for some purposes, like corporations of a domestic nature, or the servants of them, why not for others also, where the demands of justice require their amenability to the law? For my part, I cannot see; and I think that, in this case, we should make a great mistake if we gave our countenance to the refusal of the officers of this corporation

to allow the petitioner to make extracts from their books. What is the corporation of the Diamond Match Company? It is but a collection of individuals allowed to transact a certain business under a corporate name; and, through it, exercise rights it would be too inconvenient for them to use individually. Who are the President and Board of Directors of this body? They are stockholders in it, and its official servants. Who is the relator? He is a stockholder also, and a very large one. What are those books and papers in the possession of the president of the company, in this State, where business of the company is carried on? They are the record of its proceedings as a corporate body. Now it is, beyond any question, true, that any stockholder, large or small, has the right to examine those books and papers and take copies of them, whenever his interests require it, and the transaction of the business of the company, by its officers, would not be disturbed by so doing, and the time when it is sought to examine them, is not an unsuitable one. Who can gainsay his right? Can anybody? If so, by what authority? No one can; unless some power to prevent it is contained in the charter, or the corporators have made terms, with respect to examination, which would be violated if the privilege were exercised by him at the time of his demand. And this right cannot be allowed to depend, for its enjoyment, upon the accident or design of wrongful custody of them at the time. In a proper way, and for proper purposes—the enforcement or defence of his rights and interests, &c.,—they must be opened for his use. They are his, as much as they are the property of any other stockholder; and none can defeat his right.

Here then we have the books of the relator's corporation in this State, and in the custody of its chief officer, with what must be held to be the consent of the directors of the company who are its legal agents; that corporation is, for the purposes of its business, the owner of valuable real estate here, in virtue of purchase under an act of Assembly the passage of which was sought by it; it carries on an extensive and valuable business, involving powers certainly of a corporate character and with the immunity in its members of being free from responsibility, or any personal liability, for its debts or contracts; what in the name of reason is its *status*

if not that of residence, or domicile of some sort? And if any, what plea ought to weigh with this court against the petition of the relator? In my judgment The Diamond Match Company, by doing business here, is here, for all purposes of jurisdiction, in actions against it, as well as for it. Any other conclusion would recognize this strange state of things, that a corporation would enjoy immunities in a state which no individual could have. An individual in a State, for a mere temporary purpose, is under the protection of the laws and has upon him the correlative duty of obedience and submission to them. Should not a foreign corporation, transacting a large business in a State and having there the residence of its chief officer, be under like duty of obedience and submission? Certainly. Would a court hesitate to make an order, as prayed for here, if an individual within the State were a proper subject for its exercise, the proper case being made out? Surely not. Then why, I ask, in the case of a foreign corporation, acting and doing here under the sanction and protection of our laws? Is it higher than a body of our own creation? But it is urged that the foreign corporation is resident elsewhere and you cannot reach it with your process. Admitting for the sake of the argument only that to be true, yet the books belonging to it and wanted to be used, for copies, in the suit in Michigan are here by its consent in the charge of its President, and all the relief asked for can be obtained by an order on him, the custodian of them by the consent of the corporation, but for the use on proper occasions of a stockholder who is in his corporate relation a part owner of them with the other stockholders.

Impressed as I was with the very able manner in which the opponents of this petition presented their case, and recognizing the great strength of their arguments, viewing the question to be decided from their standpoint, I cannot but feel that they were met and more than met by those presented on the side of the petitioner, which are better adapted to the consideration of the case before the court, viewed in the light of the law which now prevails all over this land with respect to corporate bodies of a private nature, and those doing business by acquiescence, in a jurisdiction in a technical sense alien to that of their creation.

Having now treated the subject as fully as the exigencies of

the occasion allow, and with a sincere wish to further the ends of justice if by law in this case it may be done, I am of opinion that the prayer of the petitioner should be granted.

WOOTTEN, J., dissenting:—A company was incorporated in the State of Connecticut, under the name of "The Diamond Match Company" and to enable them to carry on their business in this State under a corporate name, application was made to the Legislature for a law authorizing them to do so and a private act was passed, which is set out in the pleadings. What authority that act confers upon them is not a matter necessary for this court to determine for the purposes of this case. It is sufficient to know that this company having its existence under and by virtue of the laws of the State of Connecticut, does carry on the business of manufacturing matches in this State, and the President resides here, and has a portion of the books and papers belonging to the company in his possession and custody. And it further appears that the relator is a large share or stockholder in the company, and for the purpose of enabling him to raise a sum of money which he desired to have at the time, pledged his certificates of stock to Messrs. Buhl and Alger as collateral security, who advanced to and loaned him a certain amount of money mentioned in the relator's petition and other proceedings, under an agreement, that if the money so loaned and advanced was not at the time designated for payment, duly and promptly paid, that the net earnings of the company so far as the same were applicable to the shares or stock so pledged should be applied to the payment of the money so loaned and advanced to the relator, David M. Richardson, by the said Buhl and Alger, it appears by the evidence before us that for a period of time set forth by the relator's petition and other papers, no dividends were declared by the Company.

The relator, David M. Richardson, has instituted suit against the holders of his stock in the Court of Chancery of Michigan, for the purpose of obtaining a surrender of his certificates of stock on the alleged ground that the holders of it, for the purpose, hereinbefore mentioned, have received from the company, dividends or profits from the stock so held by them, to an amount exceeding the sum advanced and loaned by them to the relator,

with interest thereon. The relator alleges that the books and papers, now in the possession of the defendant, Wm. H. Swift, are material and necessary evidence for him, because they show these facts, upon which this case mainly depends, and that without such evidence, he cannot maintain his said suit in Michigan, and that he is remediless without copies of such portion of such books and papers as are essential to the establishment of his claim. The relator alleges, and it is admitted in the defendant's answer, that he has applied for the privilege of inspecting the books and papers in the possession of the defendant, and that he was allowed to inspect and examine all the books and papers in defendant's possession; but denied the privilege of taking copies thereof; the directors of the company residing in the State of Connecticut, the State which created this corporation, and where it only exists, having directed him to refuse copies.

On this statement of facts, the relator bases his application for a writ of mandamus to compel the defendant, Wm. H. Swift, to allow the relator not only to inspect the books and papers of the company, which is a right conceded to him and heretofore allowed him, but to take copies of all, or such portions thereof as he may think proper to have and use for any and all purposes whereby they would be made public. The application is resisted on two grounds, first, the want of jurisdiction in this court to grant or award the writ, and secondly, on the ground that if the court has jurisdiction a proper case has not been presented for the exercise of it.

The writ is asked for in this case to compel Wm. H. Swift, President of The Diamond Match Company, a foreign corporation, to allow the relator to take or have copies made of the contracts, books and papers of the company to be used in the courts of another State, not even that which created the corporation, and in a suit to which The Diamond Match Company is not a party, and in nowise interested in the litigation; but between a stockholder and persons from whom he borrowed money on the pledge of his stock.

All proceedings instituted for a writ of mandamus are in the name of the State of Delaware, and why is it so? Because in cases where this extraordinary remedy is resorted to or sought, the State or people have relation to or are interested in the subject matter

over which the court is called upon to exercise a supervisory power. Now what sort of interest has the State of Delaware, or the people in the suit pending in Michigan between the relator and those to whom he pledged his stock for borrowed money? I confess I am at a loss to conceive of any whatever, and why then should the State be a party? If it is not properly a party, and the proceedings are not legitimately in its name, it is evident that this court has no jurisdiction or supervisory control over the subject matter, and therefore cannot award a writ of mandamus.

In England, the writ is called an *extraordinary remedy*, pertaining to the sovereignty of the State or people, and was introduced to prevent disorder by reason ot a failure of justice, and a defect of the police force. High on Ext. Remedies; Tapping on Mandamus, 76 Law. Lib. 58; 2 Potter on Corporations, Sec. 635.

The writ is a proper remedy and will be granted to compel inferior courts to exercise their jurisdiction, but not to dictate their action, or to control them in the exercise of their discretion. It is the proper remedy, and it is made available by our courts to compel *public officers* to perform specific duties imposed upon them by law. It is also the proper remedy to compel corporations to perform duties or functions which are of a corporate character, and made obligatory on them by the act of incorporation or other law.

But can it be supposed for a moment that these inferior courts, public officers and corporators can be of foreign States, and brought under the superior control of the *extraordinary remedy*, the writ of mandamus or is it not manifest that they must be of the State in which, and by whose court the mandamus issues? How can this court, enforce by mandamus, duties imposed by the law of Connecticut on its corporations, any more than it can enforce the performance of the duties of its public officers, or compel the exercise of the jurisdiction and discretion of the inferior courts of that State?

It is true that our courts have become more liberal in the exercise of their discretion in granting writs of mandamus in cases of corporations; but the ground and object of the jurisdiction are still the same, that is, that the State having an interest in corporate bodies created by it and protected by its laws the people have a right to see that all such bodies or corporations, conform to the

purposes of their creation. The proceedings, as I have before said, are always in the name of the State, and they are so because the people are interested to the extent of seeing that corporations fulfill strictly the purposes intended by their creation.

All the elementary books are in unison as to the authority from whence the jurisdiction eminates, that is from the sovereign power in the name of the State or people directed to some subordinate tribunal, corporate body, or public officer.

All within the jurisdiction of the court from and by which it is issued requiring and commanding the performance of some specific legal duty, or the surrender of some clear legal right. I think very nearly if not all the cases cited in support of the relator's side of the case, are within the principle which I have just enunciated, and I am not aware of any case to which our attention has been called, on the authority of which this court could award the writ of mandamus on the facts before us in this case.

A great many cases have been cited and we have been referred to a variety of cases, decided in other States; but not one like the relator's that we are now considering—that the writ will be issued to compel inferior courts to exercise their jurisdiction and discretion, to compel public officers to perform their duties and functions, and to require corporate bodies to comply with the law of their creation, no one doubts; but it is equally true and undoubted that there must not only be jurisdiction in the court awarding the writ, but the right to it must *be clear and undoubted*; all the books concede this to be the law applicable to the remedy by mandamus.

We are not without some light to guide us in the decision of this case, eminating from the decisions of our own courts. In the case of the *Union Church v. Sanders*, decided by the Court of Errors and Appeals, Chancellor Johns in delivering the opinion of court, said: "The first and most important question is that of "jurisdiction. For the purpose of ascertaining correctly whether "the Superior Court had authority to award the writ of peremp- "tory *mandamus*, it is necessary to examine and understand the "character of the injury complained of by the petitioner, and the "remedy which he has sought to obtain. If no legal right has "been violated there can be no application of a legal remedy. The

"writ of mandamus is a legal remedy for a legal right." *Union Church v. Sanders*, 1 Houston, 125.

And in the case of *Cannon et al. v. Janvier et al.*, 3 Houston, 31, the court said: "The writ of mandamus is a prerogative writ, as it is termed in the law, by which the Court of King's Bench in England exercises its supreme jurisdiction over public bodies and officers in the administration of justice in cases in which the law has provided no adequate or specific remedy, to prevent a failure of justice, and has been peculiarly applied to the regulation of corporations for the purpose of compelling them to observe the ordinances of their constitution and to perform their specific duties, and to respect the rights of those who are entitled to participate in their privileges." *Wilk. on Mun. Corporations*, 14 Law Lib., 193.

These cases were both church cases, and all the parties residents of our own State. The case I am now considering is a very different one indeed, and I think without a precedent. The corporation was created in Connecticut, the relator resides in Michigan, the defendant, Wm. H. Swift, resides in Delaware, and the suit in which it is alleged the copies of the books, contracts and other papers of the Diamond Match Company are desired to be used is pending in the State of Michigan, between parties resident there.

What legal right has been denied or withheld from the relator by the Diamond Match Company, or by Wm. H. Swift, its President? What clear and undoubted legal right has he shown himself to be entitled to, of which he has been deprived? It is not that he has been denied the privilege of examining and inspecting the books and papers of the Company in the custody and possession of the defendant, for he admits he has been allowed to do that; but it is said for him that he was not allowed to take copies of them. True it is he was not permitted to take copies of the books and papers, and the defendant refuses to allow him to do so under an express order of the directors or managers of the company, under whose control and direction he is as one of the board and the President thereof. The directors or managers, with the single exception perhaps of himself, reside in Connecticut, certainly not in Delaware. Now is it not manifest that the corporate body should have been made a party to this proceeding? The relator is

a stockholder, and as such bound by the action of a majority of the directors or managers, who are but the agents or instruments of the stockholders. It has been held by the courts of this State that a majority of the stockholders of a Railroad Company could procure an amendment to their charter, and change the entire line of the road, and those of the stockholders who had not paid all of their subscription were legally bound to pay it, though they were opposed to the change of the line of the road and never assented to it. It was so held for the reason that they had become members of the corporation and were obliged to submit to the action of a majority of the stockholders. *1 Houston,* 149.

The relator is a stockholder in The Diamond Match Company, and had the right to vote for directors or managers, and perhaps did, but whether he did or not is perfectly immaterial for any purposes of this case. It is presumable that all incorporated companies make and adopt rules and by laws for their guidance in the management of their business. Whether this Diamond Match Company has a by-law stipulating the time when stockholders are permitted to examine the books and accounts, or whether it has one prohibiting stockholders from taking copies thereof, I am not informed; but if there be such by-laws, the relator is bound and concluded by them, and for that if for no other reason, would not be entitled to this extraordinary remedy, a writ of mandamus. *Tapping on Mandamus,* 83, 76 Law Dib., 132.

It has been very truly said that no charge has been made against the corporation of improper management, as being prejudical to the interests of the relator—no charge that the relator is or has been deprived of any *office, status* or *right* that legally belongs to him in the said corporation, nor that he is denied in any way participation in the control or management of its business. He does not seek to be permitted to perform his duties and to exercise his right as a *director,* nor to be permitted to have all the privileges of a corporator, nor to inspect the books, nor to compel the performance of a corporate duty, specially imposed on any particular officer of the company, by the laws of Connecticut, or by the ordinances or by-laws of the corporation. He admits the privilege of inspecting books and papers has been allowed him; but he asks that copies of the contracts, books and papers of the company be

given him, to be used in a litigation in another State, to which the corporation is a stranger, and in which the State of Delaware and its people are in nowise interested or concerned. And he asks that Wm. H. Swift, the President of the Company, be commanded by a writ of mandamus to be issued out of this court to furnish such copies, or to allow them to be taken. Here we come to the important question again, is this a *clear undoubted legal right?* Unless it is according to well settled principles of law applicable to such cases, the relator is without a remedy in this court, and the writ of mandamus should be refused and his application dismissed.

In view of all the facts of this case, as presented to us and the law applicable to it, I am of the opinion that this court has no jurisdiction, and if it had, the case presented for our consideration is not a proper one for the exercise of it, and therefore the relator's application for a writ of mandamus ought to be refused.

BUCKINGHAM & Co., use of BENJAMIN S. CLARK *v.* ELIZABETH MURRAY'S Executor.

Guarantee—Original Undertaking.

A note written to the plaintiffs by the defendant, requesting them to let a third person have what goods he requires and oblige the writer, is not a guarantee, but an original undertaking, and the goods thereupon furnished may properly be charged to and recovered from the defendant.

Nevertheless, if the plaintiffs looked for payment primarily to the person receiving the goods, and only secondarily to the person making the request, the writing then becomes a guarantee, and the plaintiffs cannot recover against the defendant without having notified her of the acceptance of the guarantee.

(*New Castle, November, 1884.*)

ASSUMPSIT for goods sold and delivered, part of them to Elizabeth Murray, deceased, during her lifetime, and a part of them on her order to James Murray.

Frank E. Herbert proves the signature of Elizabeth Murray to a note written by her to the plaintiffs, requesting them to let James Murray have what goods he requires and oblige her. Dated

Feb. 22, 1882. And also the following, "To Messrs. Buckingham & Bro. and whom it may concern: You are hereby notified not to trust one on my account either by an order or otherwise.

Dated Nov. 1, 1882. Yours, &c., ELIZABETH MURRAY."

The plaintiffs then proceeded and proved by their books of original entries the sale and delivery of sundry goods and merchandize between those dates to James Murray, some of which had in the meantime been paid for by him, and bills therefor charged to James Murray at the rate of four or five bills a month and amounting in the aggregate to $704.73.

Edward G. Bradford, for defendant:

Moved for a non-suit. The declaration is on a promise by the deceased, Elizabeth Murray, to pay for goods sold and delivered to James Murray at her instance and request, but there is no proof that the guarantor had any notice of the acceptance of the guarantee from the plaintiffs, which was necessary if it was a continuing guaranty. *Brown on the Statute of Frauds*, Secs. 194–197; *Brant on Suretyship*, Secs., 157, 158; 95 Mass., 136; *Rev. Code*, 356, Sec. 7; 40 *Law Libr.*, 39; 39 N. H., 259; *Pitman on Guaranty*, 40 *Law Libr.*, 28, 29.

Lore, in reply, referred to 95 Mass., 136; *Brant, &c.*, Secs. 157, 158; *1 Smith's, Ld. Cases*, 505.

George H. Bates, for defendant:

The narr as filed, and until the common conts were added a day or two since, was clearly on an alleged collateral promise by Elizabeth Murray to pay for goods to be sold and delivered to James Murray. *Brant, &c.*, Sec. 64; *Brown, &c.*, Sec. 198; *Pitman on Guaranty*, 40 Law Libr., 28, 29; *Brant, &c.*, Sec. 159, Sec. 63. If any credit is given to any extent to a person receiving the goods, it is a collateral undertaking, *95 Mass.*, 136, 39 N. H., 259.

Charles B. Lore and *Harry Emmons*, for the plaintiff, asked the court to charge the jury that if the goods were sold to James Murray on the credit of Elizabeth Murray, then it was an original

and not a collateral undertaking on her part to pay for them, and the plaintiffs would be entitled to recover in the action.

George H. Bates, for defendant, asked the court to charge the jury as follows:

That the paper dated February 22, 1882, is a *collateral* and not an original promise by the defendant's testator, and that said paper was not a sufficient authority to the plaintiffs to deliver the goods in question to James E. Murray and to make an original charge for them against Elizabeth Murray.

That if the jury believe, upon the evidence, that any credit was given to James E. Murray, then that the paper of February 22d is a collateral and not an original promise.

That a charge to Elizabeth Murray on the books of the plaintiffs, of goods delivered to James E. Murray is not evidence in favor of the plaintiff upon the question to whom credit was given.

That the paper dated February 22, 1882, is not a sufficient promise within the Statute of Frauds to sustain an action against Mrs. Murray to answer for the debt of James E. Murray.

That said paper was, at best, a mere proposition looking to a guarantee, and there being no evidence of notice of an acceptance of the same by the plaintiffs, they cannot recover.

That the said paper was neither a continuing guarantee nor a continuing order, and therefore that it cannot sustain an action for goods sold and delivered to James E. Murray, except the first bill of goods delivered to him, which being long since paid for, as admitted by plaintiff's credit there can be no recovery in this action.

COMEGYS, C. J., charging the jury:

Gentlemen of the jury—This case is now about to be committed to you for decision; and it is therefore proper that I should state to you what the law is with respect to it, so that you may the better understand the significance and value of the facts shown by the papers in evidence and the testimony of the witnesses.

Every case tried before a court and jury, is presented by a statement of the plaintiff's claim. This is made by what is called a declaration—which generally presents it in several forms. These forms are called counts. In this case there are two of the latter.

The first seeks to charge the defendant as upon a contract of guarantee for goods furnished. This is a count upon a special contract. The other is several claims in one count, called the common money counts in an action like the present, one of which claims is for goods, wares and merchandise sold and delivered by the plaintiff to the defendant.

The suit was begun against Elizabeth Murray in her lifetime. She died, however, and it was continued against her executor, the defendant, who became party to it. He is therefore the defendant, but as executor only, the claim being against the deceased's estate.

The foundation of this case is the following writing made and signed by the deceased and delivered to the plaintiffs in this action to whom it was addressed:

A note written by Elizabeth Murray to the plaintiffs requesting them to let Jmaes Murray have what goods he requires and oblige.

Dated Feb. 22, 1882.

It was proved as being in her handwriting, and there is no dispute with respect to that. In the declaration of the plaintiff it is treated as a guarantee, or offer rather to become liable for such goods as James E. Murray might require, in case he did not, himself, pay for them; and such the defendant's counsel insists that it is. But the plaintiff denies, in this trial, that it is such an instrument, and having, since the court met, filed, under the statute, the common counts before spoken of, he rests his claim entirely upon that one of them for goods sold and delivered. As, however, the defendant insists that the paper which I have read is a guarantee, it is necessary you should know the mind of the court upon that point: for should it be a guarantee, the plaintiff would not be entitled to recover in this action. A guarantee is an agreement by one person to answer to another for the debt, default or miscarriage of a third person. The most usual example of it is, where one undertakes, if another will trust a third person, to pay the debt contracted by such third person, if the debtor should not do it. Such guarantees are strictly offers, to a proposed creditor, to become ultimately answerable for the debt of another, if the creditor will trust him. Such an offer does not, of itself, make a valid contract; but, if

accepted by the party to whom it is made, and notice of his acceptance be given to the offerer, it becomes then a binding agreement in law. The contest between the parties, with respect to the nature of the paper in question, requires that this much shall be said to you, in order that you may understand the decision of the court, which is, that the paper is not a guarantee, but a writing out of which in this case arose a contract, in contemplation of law, on the part of the maker of it, to become liable as a debtor for such goods as the plaintiffs might deliver to James Murray upon his requirment. Having determined this, it might seem that there was nothing for you to do but render a verdict for the plaintiff for the amount of his claim, there being no dispute about such amount. But the defendant's counsel insist, that the plaintiffs were not warranted by the nature of the paper, in charging the defendant's testator with the goods supplied to James Murray. We think otherwise; but the question is still open whether the goods were furnished upon the credit of the deceased as an original debtor, or upon that of James Murray with the idea that they had to look to him first for payment. If such was their idea, then the bills furnished him together with his testimony, would be evidence of that fact: if it was not their idea, then the charges in the plaintiffs' book of accounts, and the testimony of one of the plaintiff''s would be evidence to the contrary. Now in all cases, in this as well as in others, decision upon matters of fact is entirely for the jury. Bearing in mind therefore the fact that the court has decided the paper, which I have read, to be an original undertaking, according to which the goods delivered to James Murray might be charged to Elizabeth Murray, and she be looked to primarily, for paymant for them (in fact they seem to have been charged to her, according to the account book) yet the charges so made are not conclusive upon the point to whom the credit was given, but that, like all other points with respect to matters of fact, is determinable as well by circumstances as by direct proof. Recognizing therefore the apparent force of the fact that the entries in the book of accounts of the plaintiffs corresponds with the character of the writing as we have stated that character to be, and also taking into consideration the other paper signed by Mrs. Murray, in proof before you, as before said, there is still upon the question whether

or not the plaintiffs treated and considered James Murray as liable to them at all. If they did, the defendant is not liable to them as Executor of Mrs. Murray, nor was she liable in her lifetime. In dealing with this question, you are to take into consideration the testimony of one of the plaintiff's who was examined, that of James E. Murray and also the paper proved in the case, which is the notice produced by the plaintiffs given by the deceased to Buckingham Brothers, and to those whom it might concern :

Which notice is in these words :

"To Messrs. Buckingham & Bro., and whom it may concern : You are hereby notified not to trust one on my account either by an order or otherwise.

Yours, &c.,

ELIZABETH MURRAY.

Dated Nov. 1, 1882."

Having considered all the testimony and proof on both sides, calmly and impartially, if you should find for the plaintiffs, your verdict should be for the amount claimed by them, as corrected by some receipts accidentally omitted to be produced by the defendant, but afterwards shown by him and admitted by the plaintiffs, which amount is the sum of $631.66.

If you should not find for them, but for the executor, your verdict should be, simply, for the defendant.

I further say to you that in civil cases, as this is, where there is confiict of evidence, a jury should decide in favor of the party on whose side there is, in their judgment, the greatest weight of evidence. Cases involving no criminal matters are to be decided by the preponderance or superior weight of the evidence, and not upon any question of reasonable doubt, which alone has force in criminal cases. Therefore give your verdict for whichever party the law and the evidence require you to decide in favor of.

Verdict in favor of the plaintiff.

COURT OF ERRORS AND APPEALS,

JANUARY TERM,

1885.

J. ALEXANDER FULTON, defendant below, appellant, *v.* MOSES HARRINGTON and FRANCIS M. DUNN, complainants below, respondents.

Equity—Subrogation—Attorney's Lien.

The lands of A were sold by the sheriff and the proceeds applied in part to the payment of a judgment against him in which he was surety for B.

The lands of B were afterwards sold and the proceeds applied to judgments in which he was surety for A.

The amount thus paid by B as surety for A was greater than the amount paid by A for B.

A is not entitled to subrogation in the judgment thus paid as surety for B without first paying the whole amount which B paid for him; and A's assignee can take no greater interest than he himself had.

An attorney losses his lien upon a fund by taking an assignment of the fund itself.

An attorney has no lien upon a fund which he was not instrumental in creating, and which never came to his hands.

(*January 7, 1885.*)

APPEAL from Court of Chancery, Kent.

Heard before Wootten, Houston and Whitely, J.

Statement of facts in opinion of court.

J. Alexander Fulton, for appellant:

Subrogation, or marshaling of assets, is a purely equitable relief, wholly discretionary, and the court will never exercise it to the injury of third parties.

Sheldon on Subrogation, §§ 1, 4; *Kendall Exparte*, 17 Ves.,

514; *Gring's Appeal*, 89 Pa., 336; *Armstrong's Appeal*, 5 W. & S., 352; *Wallace's Estate*, 59 Pa., 401; *Wagner v. Elliott*, 95 Pa., 487; *Appeal of Mifflin Co. Bank*, 98 Pa., 150; *McGinnis' Appeal*, 16 Pa., 445.

Creditors have no lien on their debtors' choses in action.

Dundas v. Dutens, 1 Ves., 196.

Even sureties are only entitled to indemnity.

Succession to Dinkgrave, 31 La. An., 703; *Jordan v. Adams*, 2 Eng. (Ark.) 348.

The equities of Harrington must be wrought out through Atkinson.

Sheldon, § 1; *Lloyd v. Galbraith*, 32 Pa., 103; *Miller v. Atkinson*, State Sentinel, Dec. 7, 1878.

As assignee of Todd, who was assignee of Stout, Fulton stands exactly where Stout would now stand if he had not been paid.

Cottrell's Appeal, 23 Pa., 294; *Harrisburg Bank v. German*, 3 Pa., 300; *Huston's Appeal*, 69 Pa., 485; *Benedict v. Benedict*, 15 N. J. Eq., 151; *McMillan v. Gordon & Stoddard*, 4 Ala., 716; *Carr v. Waugh*, 28 Ill., 418; *Hardcastle v. Commercial Bank*, 1 Har., 374.

The equities being equal, the legal right will prevail.

The equities being equal, the court remains neutral.

Adams' Equity, 159*; *Fonb. Eq.*, 321, 350, 351; *Revised Code*, 360, § 3; *Coates' Appeal*, 7 W. & S., 99; *Knouf's Appeal*, 91 Pa., 78.

The appellant, in addition to his right as assignee of Stout and Todd, had a lien upon the fund as attorney for Atkinson in his suit with Miller, by which it was saved to Atkinson's estate.

This was, First, *Legal.*

Warfield v. Campbell, 38 Ala., 527; *Read v. Dupper*, 6 T. R., 361; *Randle v. Fuller*, 6 T. R., 457; *Barnes v. Taylor*, 30 N. J., Eq., 467; *Bower v. Kent*, 1 Cow., 172; *Ten Breck v. DeWitt*, 10 Wend., 617; *McGregor v. Comstock*, 28 N. Y., 237; *Perry v. Chester*, 53 N. Y., 240; *Hunt v. McClanahan*, 1 Heisk., 503; *Pleasants v. Kortrecht*, 5 Heisk., 694.

Secondly, *Equitable.*

Diehl v. Friester, 37 Ohio St., 473; *Patton v. Wilson*, 34 Pa.,

299; *Cowdrey v. Galveston*, 93 U. S., 352; *Trustees v. Greenough*, 105 U. S., 527.

Edward Ridgely and *James L. Wolcott*, for respondents:

Sheriff Dunn was right in passing the Stout judgment in the application of the proceeds of the sale of Atkinson's land, and will be protected in so doing by the Court of Chancery, because—though the said judgment had been paid to the plaintiff therein out of the proceeds of Todd's lands, yet as Atkinson was surety for Todd in a greater amount, and out of the proceeds of his lands did pay for Todd a greater amount than Todd paid for him—said Stout judgment was in fact, and in equity and good conscience, paid and satisfied.

By performing the contract of suretyship the principal obligation is discharged as respects the creditor, but is kept alive only between the creditor, the debtor and the surety for the purpose of enforcing the rights of the surety. Subrogation is a mode which equity adopts to compel the ultimate discharge of a debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay.

Miller v. Todd and Atkinson, decided by the Chancellor in 1878; *Sheldon on Subrogation*, §§1, 4, 11 and 13, 17 Ves. 514.

Subrogation is purely an equitable result dependent upon the facts of each case, and is independent of any contractual relation.

Sheldon on Subrogation, §§1, 2, 3, 4; *Huston's Appeal*, 69 Pa. State Reports, 485; *Neff v. Miller*, 8 Barr, 347; *Eaton v. Hasty*, 6 Brown, (Nebraska), 419; *Miller v. Todd and Atkinson*, Chancellor's Opinion.

The only case to be found conflicting with this principle is the case of *The Harrisburg Bank v. German*, 3 Barr, 303, which was expressly overruled in the case of *Huston's Appeal*, 69 Pa. State Reports, 485.

Fulton claims under an assignment from Todd, and whatever equity he could have under such assignment must be worked out through Todd; and Todd having no equity as against Atkinson could confer none upon Fulton by any assignment.

Miller v. Todd and Atkinson, Chancellor's Opinion; *Neff v.*

Miller, 8 Barr, 347; *Huston's Appeal*, 69 Pa. State Reports, 685; *Loyd v. Galbraith*, 8 Casey, 103; *Gearhart v. Jordan*, 1 Jones, 325.

Fulton is in nowise a creditor of Atkinson, but is seeking to divert the funds of Atkinson from the payment of his (Atkinson's) lien creditors to the payment of a debt owing to him from Todd.

As the right of subrogation rests upon principles of pure equity, it will not be allowed to a surety who is himself indebted to his principal, against whom he asks to be subrogated *without his first satisfying such debt.*

Sheldon on Subrogation, §§ 107, 112; *Coates' Appeal*, 7 Watts & Sergeant, 99; *Barney v. Grover*, 28 Vermont, 391.

When the lands of a surety have been taken for the debt of the principal, though the subsequent judgment creditors of the surety, who have thus lost the benefit of their lien upon his lands, have an equity to be subrogated to the lien of the judgment against the principal to the extent to which they have been deprived of the proceeds of the surety's lands by reason of the prior judgment against principal and surety, yet this equity depends entirely upon the rights of the surety against the principal and is *limited to the balance of general accounts between the principal and the surety.*

Sheldon on Subrogation, § 107; *Erb's Appeal*, 2 Penrose & Watts, Penn., 296; *Eaton v. Hasty*, 6 Brown (Nebraska), 425; *Neff v. Miller*, 8 Barr., 347.

Under the well settled principles of subrogation, Todd would have been entitled to be substituted to the rights of the plaintiff in the Stout judgment, had it not been for the superior and countervailing equities of Atkinson, which arose out of the fact that Atkinson, as surety for Todd, paid about $800 more for Todd than Todd paid for him, and to this extent the fund of Atkinson, which ought to have been available for the payment of Atkinson's lien debts, was diminished.

Miller v. Todd and Atkinson, Chancellor's Opinion.

Subrogation is purely an equitable result which cannot be assigned or waived at the pleasure of the surety. It is inherent in the relations between principal and surety and all who are related in interest to the surety. It is a principle which follows the thing or relationship in which it inheres. It cannot be separated or

severed from it. It is not a mere personal right, but rests entirely in equity. But it will never be granted when injustice will thereby be done to other persons.

Sheldon on Subrogation, §1, last clause; *Eaton v. Hasty*, 6 Brown (Nebraska), 425; *Mosier's Appeal*, 56 Pa., 76; *Loyd v. Galbraith*, 8 Casey (32 Pa.), 103; *McGinnis' Appeal*, 16 Pa., 445; *Keely et. al. v. Cassidy*, 93 Pa., 318; *Geing's Appeal*, 89 Pa., 401, cited on the other side.

It would be gross injustice to Harrington, a lien creditor of Atkinson, to allow the fund of Atkinson to be appropriated to the payment of a debt due from Todd to Fulton, who is only a creditor of Todd and not of Atkinson, especially after more of Atkinson's fund had been applied to Todd's debts than Todd's had been applied to Atkinson's.

The surety is a creditor of the principal from the time of his signing the obligation by which he is bound, just as he is liable to the creditor from that time, though his equity to be subrogated to the securities held by the creditor does not become complete until his payment of the debt.

Sheldon on Subrogation, § 102; *Appleton et. al. v. Bascom et. al.*, 3 Metcalf, 169; *Barney v. Grover*, 28 Vermont, 391; *Chancellor's Opinion, Miller v. Todd and Atkinson.*

The Act of Assembly authorizing the assignment to a surety of the debt of a principal paid by the surety, expressly provide that no defendant shall be debarred of any remedy against the plaintiff, or his representatives or assigns, by any legal or equitable course of proceeding whatever.

Revised Code, Chap. 66, § 3, 360.

This statute is merely declaratory of the well settled principles of equity jurisprudence which existed long prior to its passage, and was enacted by the Legislature to avoid the circuity and expense of suits in Chancery.

WHITELY, J.:

Henry Todd became the surety for William A. Atkinson in a judgment in the Superior Court for Kent County at the suit of E. J. Stout for real debt of $1,230.00. Interest from September 27, 1866. Entered September 27, 1866.

Atkinson became surety for Todd in four several judgments in said court.

One at suit of Farmers' Bank, real debt $1,000.00. Interest from April 1, 1869. Entered November 7, 1871. And three others at the suit of the Citizens' Building and Loan Association of Dover, one for real debt $500.00. Interest from April 12, 1873. Entered November 3, 1873. Another for real debt $1,100.00. Interest from October 11, 1873. Entered November 3, 1873. And the other for real debt $400.00. Interest from December 3, 1873. Entered December 22, 1873.

Todd's lands were sold by Peter L. Cooper, Esq., then sheriff, on the 14th and 21st days of March, 1876. And at the April term following of said Superior Court he applied, out of the proceeds of said sale, $1,370.24 to the judgment of Stout.

Atkinson's lands were sold by Francis M. Dunn, then sheriff, on April 12, 1881, and at the following term of said court, he applied the sum of $2,555.27 to the said four judgments at the suit of the Farmers' Bank and the Citizen's Building and Loan Association of Dover.

The amount paid by or out of the lands of Atkinson, as surety for Todd, exceeded by $1,185.03, the amount paid by or out of the lands of Todd, as surety for Atkinson. But by the allowance of interest on the amount of the Stout judgment, from the confirmation of the sale of Todd's lands to the time of the confirmation of the sale of Atkinson's lands, a period of five years, this excess is reduced to the sum of $773.96.

In 1869 J. Alexander Fulton became surety for Todd to the Farmers' Bank for $3,000.00, which sum, he as such surety, paid to the bank. He was also surety for Todd to other persons. He has never been reimbursed in whole or in part, for the amount paid the bank.

On the 16th day of March, 1877, Todd executed and delivered the following paper to Fulton and Atkinson :

"In Chancery, LEVI H. MILLER *v.* EMANUEL J. STOUT, WILSON L. CANNON, HENRY TODD and WILLIAM A. ATKINSON.

"WHEREAS I, Henry Todd, one of the defendants above

named, am only surety for William A. Atkinson in the judgment mentioned in the bill of complaint of Levi H. Miller, filed in this cause in favor of Emanuel J. Stout, being No. 173, April Term, 1866, J. D., 11, p. 495, for $1,230.00 with interest, and upon payment thereof out of the proceeds of sale of my real estate, would be entitled to be subrogated to the rights of the plaintiff therein, as against William A. Atkinson, the principal. And whereas the said William A. Atkinson and J. Alexander Fulton are my sureties in various matters, especially both of them to The Farmers' Bank, and the said Fulton also to Susan A. Raymond, now deceased, in sums much larger than the said judgment. And whereas, I am desirous to secure my said sureties, so far as I may be able and protect them from loss. Now know all men by these presents, that I, Henry Todd, of Dover, Delaware, in consideration of the premises, do hereby assign, transfer and set over to the said William A. Atkinson and J. Alexander Fulton, their executors, administrators and assigns, in equal proportions, the said judgment of Emanuel J. Stout against me and the said Atkinson, and all my interest therein and all remedies thereon, and especially the right to be subrogated to the rights of the plaintiff upon its being paid out of the proceeds of the sale of my real estate, subject however in all respects to any order or decree the Chancellor may make in the case above entitled.

"Witness my hand and seal this 16th day of March, A. D. 1877.

Attest: H. Todd. [Seal.]"

On 23d of March, 1880, Emanuel J. Stout assigned the said judgment to the said Todd, and on the same day Todd assigned one-half thereof to the said Fulton.

Moses Harrington, one of the respondents, before the sale of Atkinson's lands, was a lien creditor of Atkinson, viz.:

1. A judgment of Farmers' Bank against Todd and Atkinson, the latter as surety for Todd. Real debt, $1,000. Interest from April 1, 1869. Entered November 7, 1871. Assigned to Harrington, March 16, 1880, by the bank.

2. In a mortgage for real debt of $775.50, with interest from September 7, 1876, assigned to him by Farmers' Bank.

3. And in a judgment, wherein he is plaintiff. Real debt,

$2,376.23. Interest from April 12, 1876. Entered May 16, 1876.

Francis M. Dunn, sheriff, in the application of the proceeds of the sale of Atkinson's lands, passed the said Stout judgment, and applied such proceeds to the liens against Atkinson, in the order of their priority; in such application the sum of $345.52 was applied to the last named judgment of Harrington in part payment thereof.

Fulton then brought suit in said Superior Court on the official recognizance of Dunn, for an alleged misapplication of the proceeds of said sale—in not paying him one-half of the Stout judgment— to restrain which suit the bill in this case was filed. The Chancellor decreed that the injunction should be perpetual. From which decree Fulton appealed to this court.

Todd and Atkinson were both insolvent several years before commencement of this suit.

We do not see how Fulton, under either of the assignments, could have any redress *at law*, or had thereby any status, by virtue of which he could recover against Sheriff Dunn, when Atkinson's lands were sold, and the money arising thereby was not applied by the sheriff to the payment of the Stout judgment.

The judgment was entered jointly against Atkinson and Todd. At law they were both considered as principals, and Sheriff Cooper did what the law compelled him to do when he paid the judgment out of the sale of Todd's lands. Again, when Todd's lands were sold by the sheriff, and confirmation of the sale by the court, the sale, *ipso facto*, satisfied the judgment, as it was the leading judgment against Todd, and there was in the sheriff's hands more than sufficient to pay it, and if the sheriff had not paid it to Stout, his only remedy and redress would have been by suit upon the sheriff's official recognizance. Upon confirmation of the sale, the lien of the judgment upon any and all of the lands of both Atkinson and Todd was removed. But in addition, the judgment was actually paid by the sheriff to Stout, so then, when Stout undertook in 1880 to assign this judgment to Todd, who then assigned to Fulton, *he had no judgment to assign.* It was gone by payment. It was dead. It was *functus officio.* We therefore do not think that Todd as assignee of Stout, nor Fulton as assignee of

Todd, took any right, legal or equitable, under the assignment or transfer of this Stout judgment.

As regards the assignment by Todd to Fulton and Atkinson, dated March 16, 1877, of the Stout judgment, the appellant does not claim in his answer to the respondents Bill, nor did he in his argument, that it conveyed to them any legal title or rights, such as could be enforced at law. Nor could he do so. Todd was defendant in this judgment—a co-obligor with Atkinson in the bond by virtue of which the judgment was entered, and unless he had previously obtained from Stout an assignment, under our act of Assembly, in reference to "Principal and Surety," to himself as surety, he could, by no device, assign or transfer the judgment. But as an equitable assignment of whatever his rights or equities were, as against Atkinson—on account of his being Atkinson's surety, and that Atkinson's debt to Stout was paid out of the proceeds of the sale of his lands, we think it good and valid. We do not consider it an assignment of the judgment, but an assignment of Todd's rights, priorities and remedies under and on account of it, and transfers to Fulton whatever equitable rights, &c., Todd possessed, and if there were no superior and countervailing equities upon the part of Atkinson against Todd, the appellant, as assignee, could recover in a Court of Equity against Atkinson, whatever Todd himself could recover.

Atkinson was surety for Todd in four judgments for an amount greater than the amount of the Stout judgment, and he had been compelled to pay this money to Todd's creditors. He was therefore entitled to be reimbursed if Todd could do it.

"In equity, as soon as a surety pays the debt of his principal, he is considered as subrogated to all the rights, remedies and securities of the creditor, as substituted in the place of the creditor, and entitled to enforce all his liens, priorties and means of payment as against the principal."

As we have said, if Todd had paid the Stout judgment, he could, under our Act of Assembly, have taken an assignment of it from Stout, and if the requirements of the act had been strictly followed, he would have been substituted in place of Stout as plaintiff, and would have held the judgment as a lien against Atkinson's land as firmly and effectually as Stout did. The lien

against Atkinson would thus have been preserved, and when Atkinson's lands were sold by Sheriff Dunn, this judgment would have to have been paid in its order. Now what the law does by virtue of this Act of Assembly, equity does by subrogation, and therefore if there was nothing more in this case than that Todd was security for Atkinson in this Stout judgment—no countervailing equities upon the part of Atkinson—a Court of Equity would have given Todd the benefit of the lien of that judgment upon Atkinson's lands in preference to subsequent judgment or mortgage creditors of Atkinson; this is what is called "subrogation."

How then stand the equities between Todd and Atkinson? This is the gist of this case. As has been seen, Todd was the surety for Atkinson in the Stout judgment, and when his lands were sold by Sheriff Cooper, the sheriff paid out of the proceeds of sale $1,370.24 to Stout.

Atkinson was surety for Todd in four small judgments; and when his lands were sold by Sheriff Dunn, the sheriff paid out of the proceeds of sale $2,555.27 to the plaintiffs in these judgments. An excess in favor of Atkinson of $1,184.03, but this amount was reduced to $773.96 by allowing Todd interest on the sum paid from the sale of his lands, from the date of the sale of his lands to the sale of Atkinson's lands, a period of five years.

Atkinson had thus paid for Todd $773.96 more than Todd had paid for him.

Does it need the citation of authorities to convince us that Todd cannot call, nor can any assignee of his call, upon Atkinson to repay him the Stout judgment, until he (Todd) has paid Atkinson the amount of the four judgments in which he was his, Todd's, surety?

Is it not "every day equity" that a man must pay his own debt before he can collect from his creditor a debt due him? As was said by the counsel for the respondents in their argument, "does not the equity between principal and surety depend entirely upon the rights of the surety against the principal, and is limited to the balance of general accounts between them?" Would any other rule be equity?

Judge Bell of the Supreme Court of Pennsylvania in the case of *Neff v. Miller*, 8 Barr, 347, a case very similar to the one

before us, in delivering the opinion of the court, said, "Here is a surety whose money has been applied in the payment of the debt of his principal to the exclusion of his own proper creditors. That he would be entitled to come in by way of substitution upon the estate of his principal is every day equity. And did the case stop here, the Messrs. Neff would be entitled to be subrogated to the original rights of the holder of the Givin judgment to the amount which would have been properly applicable in the payment of the Smith judgment, had not Givin's judgment interfered. But Miller claims that Isaac Neff, (surety for Miller) was indebted to him in a certain amount which being deducted from the amount of Givin's judgment, leaves due to Neff but the sum of $1,648.84. If so, this limits to that amount, at furthest, the equitable right of John and Jacob Neff, (the sureties of Isaac Neff, and who had paid for him the Smith judgment) as holders of the Smith judgment. For, as we have seen, this equity is only co-extensive with the sum in which Miller stands indebted to Isaac Neff in transactions and proceedings which have had place between them. If at the time of the appropriation of Neff's estate to the payment of the Givin judgment, Neff was indebted to Miller in the full amount, there would be nothing upon which the right of subrogation would attach. So the operation of this right is curtailed in proportion as Neff stands indebted to Miller, for it is only beyond this that he has suffered injury by the neglect to satisfy the joint judgment.

And in the case of *Coate's Appeal*, 7 Watts and Sergeant, p. 99, in the same court, Kennedy, J., in delivering the opinion of the court, said: "But the right of subrogation rests on principles of pure equity, and ought never to be granted to a party where it appears that he is indebted, on any account, in an equal, less or greater amount to the person against whom the judgment exists to which he asks to be substituted, as plaintiff, without first satisfying such indebtedness."

This is so well settled as an equitable principle, that the further citation of authorities would appear unnecessary. We refer however, to *Huston's Appeal*, 69 Penna., 485; *Loyd v. Galbraith*, 8 Casey, 103; *McGinnis' Appeal*, 16 Penna, 445; *Keely v. Cassidy*, 93 Penna., 318; *Patterson v. Pope*, 5 Dana., 241; *Erb's Appeal*,

2 Penrose & Watts, 290; *Goswiler's Estate,* 3 Penrose & Watts, 200; *Kyner v. Kyner,* 6 Watts 221-227; *Bk. of Penna. v. Potius,* 10 Watts, 148; *Union Bk. of Md. v. Edwards,* 1 Gill. & John., 346, 365; *Hardcastle v. Com. Bank,* 1 Harr., 374, 378; *note.*

When a part of the proceeds of the sale of Todd's lands—in 1876—was taken to pay Atkinson's debt, Atkinson, as we have seen, was then surety for Todd in a sum greater than that for which Todd was surety for him, to wit, in an excess of $773.96.

And when, in 1881, Atkinson's lands were sold, the judgments against Todd, with Atkinson as surety, were paid out of the proceeds of sale. Such being the case, the appellant has failed to show us what it was that Todd, or he as assignee, could be subrogated to; there was nothing in fact upon which the right of subrogation could attach. For, as Bell, J., said in the case of *Neff v. Miller,* "This equity—the right of subrogation—is only co-extensive with the sum in which Miller (Atkinson in this case), stands indebted to Isaac Neff (Todd, in this case) in transactions and proceedings which have had place between them."

And as the indebtedness is the other way, from Todd to Atkinson, there can be no *subrogation* in favor of Todd in any shape, way or form, but it should be in favor of Atkinson, if there was any thing upon which it could attach.

Another matter. How has Todd been injured? The appellant failed to show this also. In fact it was impossible for him to do so, as the sum Todd paid for Atkinson was less than that which Atkinson paid for him. He who paid the most is the one who was injured, and a Court of Equity will always balance the account. We are therefore of opinion that the appellant took nothing by the assignment of Todd to him of March 16, 1877.

But the appellant claims "that in addition to his right as assignee of Stout and Todd he had a lien upon the fund as attorney for Atkinson in his suit with Miller, by which it was saved to Atkinson's estate." We cannot, however, appreciate the argument upon the behalf of any agent—attorney or other—that he can have a *lien* upon a fund with which he had no part in its creation, collection or preservation, and which was never in his possession. The appellant had no relation to, or connection with the making and executing of the bonds given by Atkinson and Todd to their

several creditors, or the entry of judgments thereon, nor to the collection thereof by execution process. He was not the attorney of Atkinson in any one of the cases; the fund arising from the sheriff's sale of Atkinson's lands was never in his hands, nor could it have been legally. If he could have a lien upon a fund arising in the manner stated, why could not any merchant or mechanic have a lien also upon it for goods sold or work done?

But if the appellant had, by any possibility, a lien, he waived it, by taking the assignments of Stout and Todd. The undisputed rule is, that the taking of any distinct and independent security waives the lien, and it is no matter whether the security is available or not. Good or bad, *it opens his hands*, and lets the goods or fund held, *go*.

Let a decree be drawn affirming the decision of the Chancellor.

ALFRED S. ELLIOTT, Assignee of the New Castle Iron & Steel Company, defendant below, appellant, *v.* EDWIN E. MONTELL, *et. al.*, plaintiffs below, respondents.

Assignment for benefit of Creditors — Appeal from Court of Chancery in Voluntary Assignment.

A voluntary assignment executed by a debtor to a trustee of his own selection, without the assent of his creditors, is invalid as against such creditors, and the property thus assigned is subject to execution attachment on the process of said creditors.

Chapter 187, Volume 15, in regard to voluntary assignment for benefit of creditors, does not conflict with Section 4 of Chapter 132 of the Revised Code.

An appeal to reverse a judgment rendered upon a case stated and referred by the parties to the opinion of the court, without a reservation in the case stated of the right of appeal. Appeal dismissed.

(*January 8, 1885.*)

APPEAL from Chancery, New Castle county. *Dismissed.*

By deed dated Oct. 15, 1881, but acknowledged and delivered on Oct. 24, 1881, the New Castle Iron and Steel Company duly assigned, transferred and set over unto Alfred S. Elliott, assignee, for benefit of its creditors generally, all the goods, chattels, tools,

implements of trade, machinery and effects of whatsoever character and description belonging to it; in trust to sell and dispose of the same and with the money arising therefrom to pay the creditors of said company in full if the assets were sufficient, but if not then to pay the creditors pro rata according to their respective demands without preference as between individuals.

The creditors had no knowledge of the assignment at the time it was made and never concurred in it.

This deed of assignment contained no reservation favorable to the assignor, nor any stipulation for release or discharge from any portion of the indebtedness.

The trust was accepted and full custody and possession of said assigned state was at once taken by said Alfred S. Elliott, who on Oct. 24, 1881, filed with the Register an inventory of the effects so assigned, together with the appraisement of the assigned state made on said date by Edward Betts, and Charles W. Pusey, appraisers appointed by the Chancellor.

The assignee gave bond with sureties in the sum of $20,000, which was duly filed with the Register.

On Oct. 25, 1881, Edwin E. Montell, a creditor, recovered judgment in the United States Circuit Court for the District of Delaware against said New Castle Iron and Steel Company for $847.82.

On the same date, Grubb and Sons, creditors, likewise recovered judgment for $1209.29, and on the same date Edward S. Davis, a creditor also recovered judgment for $1,327.07. Upon which judgments writs of execution were subsequently issued to the Marshall who levied upon the goods, chattels, tools, etc., in the custody and possession of said Alfred S. Elliott, being the assigned state of the New Castle Iron and Steel Company aforesaid, notwithstanding said assignment and transfer of said property.

The assigned state was subsequently sold by the Assignee at private sale, by consent without prejudice until the rights of the respective parties had been determined by the Chancellor.

John H. Hoffecker, Jr., for appellant:

Assignments may be either:

I. To the creditors themselves directly which are not valid without their assent, or

II. To trustees for the benefit of creditors and such assignments do not require the assent of creditors to render them valid and operative.

"Such is the settled rule of our law."

See *Burrill on assignments*, P. 166, Sec. 125; *Nicoll v. Mumford*, 4 Johns, Ch. 522; *Ward v. Lewis*, 4 Pick., 518; *Pingree v. Comstock*, 18 Pick., 46; *Weir v. Turnhill*, 2 Yerger, 57; *Robertson v. Sublett*, 6 Humph., 313; *Ingram v. Kirkpatrick*, 6 Ired. Eq., 462; *Stimpson v. Fries*, 2 Jones Eq., 156; *Jones v. Dougherty*, 10 Ga., 273; *Bellany v. Bellany*, 6 Fla., 62; *Hall v. Dennison*, 17 Vt., 310; *2 Kents Com.*, 532 and notes; *Brown v. Chamberlain*, 9 Fla., 464; *Forbes v. Scannell*, 13 Cal., 242.

By the established principles of law as held by eminent authority in this country it is not necessary to the creation of any trust by deed in favor of any person, that the person for whose benefit the trust is created should be a party to it.

See opinion of Justice Story in *Halsey v. Whitney*, 4 Mason, 206, 214. Such assignment takes effect from the execution and delivery, and not from the time it is assented to by the creditors. 2 Story Eq., 1037, note a; *Nichols v. Mumford*, 4 John Ch., 529. It is not necessary to the validity of such a deed of assignment that the creditors should be parties to it, a bona fide assignment accepted by the assignee will be deemed

I. A valid conveyance.

II. Founded on a good consideration.

III. Good against creditors proceeding against the assigned estate by attachment, execution or otherwise. Unless all the creditors repudiate it. *2 Story's Equity*, Ch. 28, Sec. 1036 and notes; *Brooks v. Marbury*, 11 Wheat., 78; *Grover v. Wakeman*, 11 Wend., 189-227. And Courts of Equity generally will compel the execution of the trust for the creditors, though they be not at the time assenting and parties to the conveyance.

Halsey v. Whitney, 4 Mass., 206, 214; *Nicholl v. Mumford*, 4 John. Ch., 522, 529; *Brooks v. Marbury*, 11 Wheat., 78; *Gray v. Hill*, 10 Sarg. and R., 436; *Kinnard v. Thompson*, 12 Ala., 487; *Smith v. Turrentine*, 8 Ired. Eq., 185.

If it is executed by the assignor and delivered to the assignee, and he accepts it and enters upon the performance of the trusts, he is as much bound as if he had executed it.

Cunningham v. Freeborn, 1 Edw. Ch., 256, affirmed on appeal 11 Wend., 240; *Burrill on Assignments*, 357, Sec. 245.

Nor is it necessary to the validity of a voluntary assignment by a debtor that the creditors should be consulted previous to making it.

Burrill on Assignments, 409, Sec. 283; *Brashear v. West*, 7 Pet., 608–613; *Reinhart v. Bank of Kentucky*, 6 B. Mon., 252; *Skipwith exes. v. Cunningham*, 8 Leigh., 271; *Phippen v. Durham*, 8 Gratt., 457; *Johnston v. Zanis Trustees*, 11 Gratt., 552, 564; *Dance v. Seaman*, 11 Gratt., 778, 781; *Burrill on Assignments*, 416, 417.

It is no objection that it was made pending suit by the creditors of the assignor. 2 Kent Com., 532 and notes. The assignment when once accepted by the assignor operates as a conveyance and not as a mere power, and cannot be revoked by the assignor, or defeated by the renunciation of the assignee.

Burrill on Assignments, 431; *Briggs v. Palmer*, 20 Barb., 392, and cases cited in note 5.

The assignment to Elliott was an assignment at common law and was not statutory.

Chap. 187, Vol. 15, p. 311, &c. (Laws of Delaware), does not give such deeds any power or validity beyond their unqualified recognition, but simply prescribes a mode for enforcing the trust and requires that the trustee should give bond to "faithfully execute the trust," and that the warrant of attorney "shall inure to the use of all persons interested in the property assigned."

Before such an act the remedy had to be sought by the creditors through a Court of Chancery.

The construction given by the Chancellor is not the construction urged by the respondent.

How could it be possible for the assignor to revoke the trust after acceptance, and qualification by the assignee as provided by our statute above quoted. He would be prevented by the court and would be stopped by his own act. 2 Story Eq., 1037, note a.

Massachusetts furnishes the only prominent exception to the

principles as above contended for, and that exception grows out of the operation of the old system of attachment, and is regulated by a special statute.

Burrill on Assignment, 32, 33, 34, 35 and notes.

The old English rule as laid down in *Bell v. Cureton, Garrard v. Lauderdale, Walwyn v. Coutts, Acton v. Woodgate* and other cases, and followed approvingly in *Waters v. Comely*, 3 Harr. (which was decided as far back as 1840), is not now, and never has been the prevailing rule in this country.

See *Burrill on Assignments*, 167, *et. seq.* and notes; *2 Kent Com.*, note d., 718.

The Supreme Court of the United States have expressly so ruled in *Mayer v. Hallman*, 91 U. S., 496; *Reed v. McIntyre*, 98 U. S., 507.

The same doctrine is enunciated in *In re Biesenthal*, 15 N. Bank, Rep., 228; *Everett v. Stone*, 3 Story, 454; *Dodge v. Sheedon*, 6 Hill, 9; *Seamon v. Sloughton*, 3 Barb., 344; *Cook v. Rogers*, Am. Law Reg., Vol. 14, 633.

The precise question involved in this present case has never been squarely before this court.

In *Waters v. Comely*, 3 Harr., 117, the court to have decided otherwise than it did, must have sustained an act by the debtor which was confessedly fraudulent.

And in violation of the statute of Insolvency.

There the court interferred to prevent the debtor from making an unlawful and fraudulent preference. Here the court is asked by the complainant to aid him in obtaining and enforcing an unlawful priority and an unwilling preference.

In so far as the court in *Waters v. Comely* undertook to decide that a debtor in failing circumstances cannot make a general assignment with no preferences or benefits reserved, unless his creditors assent, it was *obiter dictum* and should not control the court now in deciding differently.

The rule as laid down in *Waters v. Comely* is not the rule of the United States Supreme Court, and it is not common law.

Benjamin Nields and George Gray, for respondents:

Assignments by insolvent debtors in trust to pay their debts,

either in a specified order or *pro rata* are not deemed of sufficient validity to protect the assigned property from the attachments of the creditors of the assignor. There is no adequate consideration; and without this, no insolvent debtor can so dispose of his property as to place it beyond the reach of his creditors. The validity of such assignments much depend upon the assent of the creditors. Nothing being paid by the assignees, the consideration, as to them, must consist in their covenants to execute the trusts.

The creditors are not obliged to become parties to them; nor is their assent to their provisions to be presumed. *They may prefer to resort to attachments.* The option is to be exercised by them, and to be evidenced by some overt act on their part.

If they decline or omit to join in the assignment, there are no *cestui que trusts* and so no trusts to be executed, and the consideration entirely fails. All the objects of the assignment are defeated and the whole proceedings prove abortive, leaving the assignee's property to be taken by the creditors in such way as they may deem expedient.

Fall River Iron Works v. Crood & Trusts, 15 Pickering, 11.

In the case of *Waters, et al. v. Comly*, 3 Harr., 117, the court cites with approval the principle, stated by the court in the case of *Bill v. Curction*, 2 M. & K., 511, viz: "A man who, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself and not to his creditors. It would be a result most remote from the contemplation of the debtor, if it should be held that any creditor discovering the transaction, should be able to fasten upon the property and invest himself with the character of *cestui que trust.*"

It being the law in this State, as declared in *Waters v. Comly*, that a debtor, who executes a deed conveying his property to a trustee for the payment of his debts, to which deed his creditors are neither parties or privies, will not divest the debtor of the beneficial interest in such property, nor create the relation of *trustee and cestui que trust*, between the person to whom the conveyances is so made, and the creditors of such debtor.

In what respect, if any, did the law requiring trustees in voluntary assignments for the benefit of creditors, to give bond, with

security, for the faithful execution of the trust and other purposes, passed March 18th, 1875, modify the rule of law in this State as declared in *Waters v. Comly*?

This law, nowhere, expressly or by implication, creates the relations of trustee and *cestui que trusts* between the assignee and the creditors, nor does it in any way attempt to alter or modify the law as it existed at the time of its passage. It does not require the creditors to recognize the assignee in any way. It does not provide that the creditors shall accept from the assignee any part of the assigned estate. It does not provide that if the creditors refuse to accept from the assignee their proportions of the assigned estate, that the debtor shall be discharged from the payment of the portion so received by the assignee, or from the payment of any amount whatever.

The law does not purport to be an insolvent law; it has none of the distinctive features of such a law. It does not provide for the discharge of the assignor from the payment of his debts or any part thereof, nor does it prevent creditors from proceeding against the assignor to recover judgments on the claims and issuing executions thereon, notwithstanding the assignment having been made for the benefit of such creditors.

This act appears to have been intended to apply to, and operate upon, voluntary assignments made for the benefit of creditors, under and pursuant to the law existing in this State at the time it was passed, viz: Assignments made with the knowledge and consent of the creditors of the assignor, and in such form and with such effect as to create the relation of trustee and *cestui que trust* between the assignee and creditors; where such an assignment is made the effect of the law is to protect the debtor, as well as the creditors, by requiring the assignee to give security.

The assignment was made in this case to prevent the above named judgment creditors from making their claims by execution process.

It does not appear that any of the creditors assented to the deed of assignment, none were named in the deed of assignment. No list of them was given; and no concurrence of any one or more of them anywhere appears. When it nowhere appears that any of the creditors consented to become parties or privies to

the trust then, as between the assignee and creditors, it cannot be assumed that there exists the relation of *cestui que trust* and trustee.

Where none of the creditors consent to the deed of assignment, but all refuse to become parties or privies to the trust then certainly, as between the assignee and creditors, the relation of *cestui que trust* and trustee cannot exist, and, in the absence of affirmative consent on the part of the creditors, the court will not presume that they do consent.

If it should appear that only part of the creditors consented, then the assignee would hold the property only for the benefit of those who consented thereto, which would be in effect an assignment for the benefit of such of the creditors only as consented to the assignment, and would be void.

Sec. 4, Chapter 132, 785, *Laws of Delaware*, provides, "If any person in contemplation of insolvency, or in contemplation of taking the benefit of any of the insolvent laws of this State, shall make an assignment of his estate, or effects, for the benefit of creditors, and by such an assignment, either under its provisions, or otherwise, shall prefer any creditors to others, or shall, in or by such assignment, secure or pay to any creditors a greater proportion of his debt, or demand than shall be secured or paid to all his creditors; every such assignment so giving a preference shall be deemed fraudulent and absolutely void, and the estate or effects contained therein shall be liable to be taken in execution, or attached for the payment of such assignor's debts, as fully as if no such assignment had been made; and the person making such fraudulent assignment shall forever be deprived of the benefit of any insolvent law of this State."

In this case, the assignee is not a creditor of the company, and, therefore, holds none of the property for the benefit of himself.

In the case of *Waters et al. v. Comly*, 3 Harr., 117, the court say, "The purpose and policy of the law is to prevent a voluntary transfer of the entire estate of the debtor for the benefit of a few creditors."

And in the same case the court further say, that "If Waters & Laird, under the same circumstances, instead of giving the bond, had executed a deed conveying their property to McMakin, Burgess

& Kelly for the payment of their debts, to which the creditors were neither parties nor privies, it would not have divested the beneficial interest of Waters & Laird, and created the relation of trustees and *cestuis que trust* between McMakin, Burgess & Kelly, and the creditors *mentioned in the schedule.*"

Wallwyn v. Coutts, 3 Mer., 707; *Gaward v. Lord Lauderdale*, 3 Sm., 12; *Acton v. Woodgate*, 2 M. & K., 495; *Bill v. Cunton*, 2 M. & K., 511; *Fall River Iron Works v. Croad and trustee*, 15 Pickering, 11.

In the case of *Bryden v. Moore*, 11 Pickering, 362, the court say: "That an assignment to one to pay creditors who are not parties, or assenting thereto, is void as against the creditors of the assignor.

It has also been held that when time is allowed for creditors to come in, if the property be attached before the creditors have all come in, the attaching creditor takes precedence of a creditor who shall afterwards become party to the assignment."

Russell v. Woodward, 10 Pickering, 408; *Marston et. al. v. Cobim*, 17 Mass., 454.

In the court below SAULSBURY, CHANCELLOR, delivered the following opinion:

"It is agreed that on the 24th day of October, 1881, the New Castle Iron and Steel Company, then being indebted to divers persons and firms and among others to Edwin E. Montell, Grubb and Sons, and Edward S. Davies, made a voluntary assignment of all its effects to Alfred S. Elliott in trust to sell and dispose of the same and to collect and recover all the outstanding claims and debts due the said company, and from the proceeds after deducting his reasonable costs and charges, to pay the creditors of the said company in full, if the assets realized should be sufficient, but if not sufficient, to pay the demands of said creditors *pro rata*, without preference as between individuals. Alfred S. Elliott, the assignee accepted the trust and entered upon the discharge of his duties under it and filed with the Register in Chancery an inventory of the effects assigned, on the same 24th day of October, 1881, accompanied by his affidavit and gave bond with sureties

and on the same day the chancellor appointed appraisers, who returned their appraisement on the 26th day of October, 1881.

It is further agreed that the creditors of the New Castle Iron and Steel Company had no notice or knowledge of the said assignment at the time of its execution, and that neither Montell, Grubb and Sons or Edward S. Davies have ever given any assent thereto. It further appears as admitted that the said Montell, Grubb and Sons and Davies have severally recovered judgments on their respective claims in the Circuit Court of the United States for the District of Delaware, at the October Term, 1881, of said court, on the 25th day of October, and subsequently caused writs of *fieri facias* to be issued which were delivered to the marshall, who levied upon the goods and chattels assigned as aforesaid, as the property of the said Company, and advertised them for sale in execution of the writs. Pending the proceedings the assignee wrote to the creditors suggesting that the interest of all parties would be best promoted by permitting them to dispose of the goods at private sale, and obtained the consent of the said execution creditors among others, with reservation of their rights, the complainants expressly stipulating that their status was not to be affected but that the fund should be held subject to the determination and distribution of a Court of Equity upon all the facts. By this sale therefore, the goods have simply been converted into money, without altering the position of the parties in relation to the right thereto.

Upon the facts the case before me is reduced to the consideration of two questions.

I. Whether the assignment by the New Castle Iron and Steel Company, taken irrespective of the Act of the General Assembly, passed March 18, 1875 (15th Vol., 311) was sufficient to vest the property therein mentioned in Alfred S. Elliott the assignee, so as to protect it against creditors, neither parties nor previous to the said asssigment even consenting thereto.

II. Whether if not otherwise protected the said Act of March 18, 1875, has the effect to render the assignment valid, so as to have that operation.

In determining the first question it seems to me that this case falls clearly within the principle announced in *Waters et al. v. Comly*, and whatever might have been my opinion if the matter

had been *res integra*, I am bound by the judgment of the Court of Errors and Appeals. In that case Waters and Laird, being in failing circumstances, executed a bond to McMath, Burgess and Kelley for a large sum of money, exceeding their assets, upon a parol trust to pay the creditors mentioned in a schedule. Kelly, one of the assignees, being a creditor to the amount of $400.

It is manifest from the statement of facts that there was an attempt to prefer creditors, in which it differs from the case now before me, but the decision of the court did not proceed wholly nor mainly upon that consideration. It was an appeal from chancery and the chancellor in discussing the meaning of the act concerning fraudulent assignments had said: "It is apparent this act was not made to prevent assignment, but to prevent persons in contemplation of insolvency, either by assignment or otherwise, doing any act to prefer creditors." This view was not sustained by the Court of Errors and Appeals. On the contrary it was distinctly announced by that court and reaffirmed in subsequent cases that when no assignment is attempted, the preference by a debtor of particular creditors either by payment or through the instrumentality of trade is not forbidden even if done in contemplation of insolvency.

In the case of *Wharton et al. v. Clements et al.*, 3 Ch. Rep., 209, Chancellor Bates construes the case of *Waters v. Comly* to announce the conclusion of the majority of the court on this point, that the bond being given in an amount exceeding the whole of the property of the debtor was equivalent to and a substitute for a formal assignment, and as such was an evasion of the statute. The decision in *Waters v. Comly*, however, was not based entirely nor principally on that ground, but on another in which the whole court concurred and which was entirely beside any question of preference of creditors.

This ground was the invalidity of a voluntary assignment executed by a debtor to a trustee of his own selection without the privity or assent of his creditors, as against such creditors.

On this subject the enunciations of the judge are harmonious and unequivocal. They all hold in conformity with *Garrard v. Lord Lansdale*, *Bell v. Cureton*, and the line of cases announcing the same principle, that a deed of assignment operates merely as a power to the trustee, revocable by the debtor, that the character of

cestui que trust never existed between the creditor and the trustee, but that the debtor himself was the only *cestui qui trust*, having in him the whole beneficial interest, that the arrangement was one wholly for the convenience of the debtor and that the creditors were without remedy against the nominal trustee either at law or in equity.

Such being the judgment of the highest court of this State it is binding upon me and in my opinion it clearly embraces the case of this assignment now under consideration.

II. I cannot see that the matter is helped by the act of March 25, 1875. That act no where professes to declare what shall constitute a valid assignment but only prescribes that when a voluntary assignment is made, certain things must be done as therein specified. Now this must be construed to mean an assignment not prohibited by law and which would otherwise be unimpeachable. That this must be the meaning is manifest from the phrase "in trust for his creditors or some of them." Now were the construction to be given that this act validated an assignment because its provisions were complied with, it is clear that such construction would repeal the statute prohibiting a preference of creditors by a debtor in contemplation of insolvency for the act speaks expressly of a partial as well as of a general assignment and of an assignment for the benefit of particular creditors in exclusion of others.

The statute must be read in the light of the purpose for which it was enacted, to wit, the security afforded both to the *cestui que trust* and the assignor, by the bond of the trustees, the inventory and appraisement and the supervisory control of the chancellor and not as validating assignments otherwise illegal, or as in any wise altering existing laws regulating the capacity on the part of debtors to create such trusts or as declaring the effect of such trusts when attempted to be made between the debtor and his voluntary assignee without the privity or assent of his creditors.

Decree accordingly."

Benjamin Nields, for respondents, moved for the dismissal of the appeal:

Where by statute a court or judge is clothed with a special

jurisdiction, and no appeal is provided by statute, none will be to this court.

Baltimore, &c. Co. v. Northern, &c. R. R., 15 Maryland, 193; *Condon's Case*, 8 Gill & Johnson, 443; *Carter v. Dennison*, 7 Gill, 157; *8 Lamott v. Mattyby*, 8 Md., 5; *Lansing's Appeal*, 10 Wis., 120.

A writ of error does not lie to reverse a judgment rendered upon a case stated and referred by the parties to the opinion of the court.

The Inhabitants of Alfred v. the Inhabitants of Saco, 7 Mass., 379; 9 Mass., 328; 21 Pickering, 227.

The remedy of the assignee was complete at law—replevin, assumpsit.

THE COURT sustained the motion and dismissed the appeal.

SUPERIOR COURT,

SPRING SESSIONS,

1884.

JOHN M. BUCKMASTER *v.* JEHU M. REED.

Suit against Administrator for share of Estate—Plea of Statute of Limitations.

Upon demurrer to the plea of the statute of limitations in an action of assumpsit against the administrator for a distributive share of the estate the plea of the statute *held* to be a complete bar to the action.

(*Kent, April, 1885.*)

ASSUMPSIT for distributive share of estate.

The defendant, Jehu M. Reed, was appointed administrator of Sarah A. Buckmaster, November 14, 1867, and gave bond in the usual form.

The administrator passed his final account February 17, 1870, showing an unappropriated balance in his hands of $1,277.56.

The plaintiff was one of the heirs-at-law of Sarah A. Buckmaster, the intestate, and brought an action of *assumpsit* to collect his distributive share of her estate.

This action was not brought until April 21, 1883, more than thirteen years after the passing of the final account of Reed as administrator. The reason of the long delay was the absence of the plaintiff, whose home was in the West, and had been all the intervening years.

This *form* of action was chosen rather than an action on the bond, in order to avoid the statutory plea of limitation. As an answer to the plea of the statute, the plaintiff replied, by way of

demurrer, first, that the defendant was a *trustee*, and secondly, that the cause of action arose upon *a record*, to wit, the settlement of the defendant's account in the Register's office. Issue was joined on the demurrer.

J. Alexander Fulton, for the plaintiff:

On the demurrer to the plea of the statute of limitation cited, 2 Halstead, 181; 11 Pa. 207; 24 Pa., 482; *Farmers' Bank v. Gardner*, 4 Harr., 430.

On the record: 17 Md., 505, 550; 3 Harr., 433.

N. B. Smithers, for the defendant:

As to the plea of the statute of limitation. At common law an action of assumpsit would not lie against an executor or administrator for a legacy or distributive share, without proof of an express promise by him to pay it. (He then read the provision of the *statute* on the subject.) Without assets in his hands to pay it, no legal obligation is imposed upon him to pay it. *4 Harr.*, 430; *3 Harr.*, 433. The objections to the plea in support of the demurrer to it are, first, that the cause of action was a debt of record, and secondly, because the action was against a trustee, an administrator, for a liability of his as such, and the statute of limitations does not apply to a trust. Now, the statute itself expressly declares that no action of assumpsit shall be brought after three years from the accrueing of the cause of action.

A number of other points were made and argued, but were not passed upon by the court, for the reason that the COURT *held* the statute of limitations to be a complete bar, and gave judgment for the defendant on the demurrer.

DOE d. ELIZABETH MILBOURN *v.* ENOCH DAVID, tenant in possession.

Possession of Co-tenants—Ouster—Statute of Limitations.

The possession of one tenant in common is the possession of his co-tenants, and is presumed to be with their consent, and in support of their common title; and the statute of limitations will not run against the co-tenants, until there is an actual ouster, or such acts as are equivalent thereto.

(*Kent, April 30, 1885.*)

EJECTMENT for interest of heir at law in dower land.

This ejectment is brought for one-third of the one-fourth of this tract of land, equal to one-twelfth. The land contains about two hundred acres and lies in Kenton hundred.

Originally it belonged to Samuel Patterson, who died in 1825, leaving a widow and four children.

Mary Patterson, the widow, to whom this land was assigned as dower in July, 1829, married Nathan Smith in 1827. Smith died in 1839, and about a year after, she married Enoch David, the defendant, and died 1855. She was step-mother to the Patterson children.

Thomas Patterson was the eldest son. He never married; went to sea, and roved about from place to place. Went to California and other places. Kept up some irregular correspondence with his family until 1853, since which time he has never been heard of.

Samuel Patterson, the second son, always resided in Kent county, and died in Smyrna in 1878, leaving a large family.

Mary Truax, the eldest daughter of Samuel Patterson is still living and resides in Smyrna, wife of James Truax.

Elizabeth Milbourn, the youngest child, was only 6 months old when her mother died. She was born August 30, 1822. She married Edward Milbourn, November 8, 1838. He died April 15, 1880.

*March 13, 1841, Edward Milbourn and his wife conveyed their interest in this land to Enoch David, defendant. And May 3, 1845, Samuel Patterson and Mary Truax conveyed their interest

*NOTE—This date on trial was admitted by both parties to be a mistake but does not enter into the controversy.

to the same. Thus Enoch David became the owner of the three-fourths of the whole in fee.

Enoch David was in the uninterrupted possession of said lands from the time he married Mary Patterson, then Mary Smith, in 1841.

The deposition of John D. Voshell taken on behalf of the defendant and returned to the court, and on which publication had passed, was offered in evidence and objected to by *Fulton* on the ground that his occupation was not stated in the notice given him by the other side of their intention to sue out the commission to take depositions, and for which reason he had declined to take any notice of it, or to file any cross interrogatories within ten days after receiving it.

Wolcott, for defendant: Voshell had no occupation at the time, and therefore none could be stated. But by the rule of court if that was a sufficient objection to exclude the deposition, there should have been exceptions taken to the issuing of the commission on that ground upon the other side in three days, and it could not now be excepted to on that ground.

Fulton replied, and contended to the contrary, and that the latter rule did not apply in such a case.

THE COURT held the deposition admissible in evidence, COMEGYS, C. J., dissenting.

J. Alexander Fulton, for plaintiff:

A person who leaves his home or native place for a foreign country or another State, and remains absent and without being heard from for seven years, is presumed to be dead; and, in such a case, his heirs at law may recover his real estate in an action of ejectment, in the same manner as if his death were proved.

1 Gr. Ev., § 41, from beginning to end of second line, 53; 2 Gr. Ev., § 278, both sections in full; *Crawford v. Elliott*, 1 Hous., 465, 2 Syl. and 2 clause of opinion, page 467; 29 A. L. J., 426.

The presumption of death does not arise until the *expiration* of seven years from the time the person was last heard from; and if his death is asserted prior to that time, those asserting it must prove it; but after the expiration of seven years from the time he

was last heard from, the law raises the presumption that he is dead, and those who assert that he is alive must prove it.

Authorities, supra.

If a man is single when he departs the presumption, in the absence of proof to the contrary, is that he continues so.

1 Gr. Ev., § 41; 2 Gr. Ev., § 355; 6 Ves., 557; 3 C. & P., 402.

If Thomas Patterson was alive at the date of the deed from Edward Milbourn and his wife, Elizabeth, the present plaintiff, to Enoch David the defendant, no part of his estate, nor any possible interest she might afterwards acquire therein, passed by that deed to the said defendant; and, on this branch of the case, she is entitled to recover.

2 Bouv. L. Dic. Tit., *Possibility*, pl. 4, 353; 5 Jac. L. Dic. Tit., Release, 440; 3 Jac. L. Dic. Tit., Grant, 194· *Holland v. Jackson*, Bridgman R., 76; *Carleton v. Sir William Leighton*, 3 Mer., 667: *Kean v. Roe*, 2 Har., 115.

That as Mrs. Milbourn was a married woman at the time of her brother's death, and until the 15th of April, 1880, when her husband died, the statute of limitations has no application in this suit, and she is not barred by lapse of time.

That the possession of one tenant in common is the possession of all, and enures to the benefit of all; and the tenant in actual possession can never plead the statute of limitation against his cotenants without actual ouster, or such acts as are equivalent thereto.

Fisher v. Prosser, Cow., 217; *Revised Code*, Chap. 122, §3, 727; *Gage v. Smith*, 27 Ct., 70; *Miller v. Snoden*, 21 Me., 201; *Bank v. Green*, 35 Ark., 84.

James L. Wolcott, for defendant:

On the plea of the statute of limitations remarked that it was running against Thomas Patterson as to his share in the dower land by the death of the tenant in dower before his disappearance, and had been running against him some six years when the presumption of his death arose.

1 Washb. on Real Estate, Secs. 7, 8; *Cowp.*, 217; *Doe v. Crocker*, *3 Allen*, 355, 354; *19 Texas*, 488; *10 S. & R.*, 182; *1 W. & S.*, 184; cited on what will constitute adverse possession by one tenant in common against another.

THE COURT, COMEGYS, C. J., charged the jury:

It is claimed that the statute began to run against Thomas Patterson on the death of his mother in 1852. Also that the plaintiff is barred by the adverse possession or holding of the defendant for twenty years and more. But in case of a tenancy in common, the possession of one tenant in common is the possession of his co-tenant, and is presumed to be with his consent. Lord Mansfield in *Fisher v. Prosser*, Cowp., 217, said: "Some ambiguity seems to have arisen from the term '*actual ouster*,' as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over *adversely* without a title. If he does, such holding over, under circumstances, will be equivalent to an *actual ouster*. For instance, length of possession during a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title. But if tenant *pur autre vie* hold over for twenty years after the death of *cestuy que vie*, such holding over will in ejectment be a complete bar to the remainderman or reversioner; because it was *adverse* to his title. So in the case of tenants in common; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant. Nor indeed is a *refusal* to *pay* of *itself* sufficient, *without* denying his *title*. But if, upon demand by the co-tenant of his moiety, the other *denies to pay*, and *denies his title*, saying he claims the whole and will not pay, and continues in possession; such possession is adverse and *ouster* enough." But the court cannot sanction the rulings in the cases cited by the counsel of the defendant from the *Penna. Reps.* The court therefore does not consider that the facts and circumstances proved in the case would warrant the court in leaving it to them to infer or presume from it that there had been an ouster of the plaintiff by the defendant from the possession of the premises, notwithstanding the length of time she had been out of any actual possession of it. A bare possession of twenty-nine years in such a case by the defendant is not sufficient for that purpose.

Verdict for plaintiff.

Allabeda B. Kirkley *v.* Thomas T. Lacey.

Married Woman—Sole Trader—Agent.

Under the statute in this State a married woman, with her own money and property, may engage in any kind of business, as a *femme sole.*

A married woman may carry on her business through an agent and may constitute her husband such agent, who may as such do anything pertaining to said business.

The business thus carried on is not a fraud upon the creditors of the husband if his money is not used in the conduct of the same.

Fraud is a matter of fact to be proven and will never be presumed.

(*Kent, May 6, 1885.*)

Trespass on the Case against the defendant, Sheriff of Kent County, who seized certain personal property, claimed by the plaintiff to be hers, upon executions issued to him against James Kirkley, husband of the plaintiff.

The plaintiff testified that she was engaged in business and her husband, James Kirkley, acted as her agent. The personal property, consisting of salt hay, taken by the defendant, was her property, bought with her money. She had received money at different times from her mother and had on several occasions borrowed from other parties.

Mr. Fulton, on cross examination, asked her if her husband did not take funds or money arising from the sale of such goods and appropriate it to the payment of his own debts?

Mr. Massey, for plaintiff, objected to the admissibility of the question as not being material or pertinent to the inquiry whether or not the goods in question were the property of the plaintiff when they were seized and sold by the defendant.

The Court overruled the objection and the witness answered the question in the negative.

Other witnesses testified of their knowledge of her doing business through her husband as agent, and of the several loans made to her, one of which was by the National Bank of Dover by discount of the endorsed note of "James Kirkley, Agent," the proceeds being placed to his credit in the same style and checked out in like manner.

Other witnesses testified that they had transacted business with James Kirkley during the time in question and they heard

nothing of his acting as agent for his wife. It was testified that the plaintiff was never engaged in business before and had no means before her marriage with James Kirkley. Several deeds were offered in evidence of the purchase of real estate by the plaintiff the prices therefore aggregating several thousand dollars, and more than the sums of money borrowed by her.

James Kirkley had been in the business of buying hay for several years when he failed and was sold out by the sheriff, after which time the business was claimed to be carried on in the name of and for the plaintiff. Witness testified that the business to all appearances was carried on as theretofore.

Mr. Massey asked the deputy sheriff what James Kirkley, the husband of the plaintiff said to him when he went to Leipsic to levy on the property, about the hay not being his, but the property of his wife, and only in his hands as her agent.

Question objected to on the ground that a husband cannot be a witness for his wife in any case.

THE COURT overruled the objection and admitted the question.

John P. Saulsbury, for plaintiff :

Where the officer seizes the property of one person on an execution against another, he is a trespasser *ab initio*.

Herm. on Execu., 635.

A husband may act as the agent of his wife in any business carried on by her.

Bish. on Husband and Wife, 439 ; 59 Barb., 61 ; 50 Ill., 481; 25 Mich., 195 ; 33 N. Y., 518 ; *Statute as to married women* ; *Rev. Code*, Chap. 550, 479, 480.

Fraud must be proved like any other fact.

J. Alexander Fulton, for defendant :

At common law all personal property of the wife in her possession becomes the property of her husband absolutely. A married woman must prove her title to personal property after the insolvency of her husband beyond a reasonable doubt, as against his creditors.

18 Pa., 363; 38 Pa., 277; 36 Pa., 410; 35 Pa., 375; N. J. Eq., 18, 472; Pa. Dig., 996; 42 Barb., 567.

Edward Ridgely and *James L. Wolcott*, on same side.

George V. Massey, for plaintiff, cited 33 N. Y., 520, overruling 42 Barb., 569, cited above.

He contended that the proof is clear and express that the hay, the property seized and sold by the sheriff, was bought with the money of the wife, the plaintiff, without having been mixed with any goods or property of her husband seized and sold with it. If the plaintiff was the owner of the hay, she was entitled to the verdict of the jury; but if not, then the defendant was entitled to the verdict.

Del. Laws, 15 Vol., 603; 25 Mich., 195; *Married Women's Act, Del. Laws*, 15 Vol., 289, Sec. 1.

WHITELEY, J., charging the jury:

This is an action of tresspass by plaintiff against Sheriff Lacey for levying on and selling her goods, hay, &c., on executions against her husband and another.

Her claim is, as she declares under oath, that the hay levied and sold was hers—her property; and gave account of how she obtained money to buy it after her husband's failure, she borrowed money from Seward, $100, at two different times, from bank on Swane's & Pickering's endorsement, $700; and money from her mother, and rent of farm, sale of wood and rails and posts.

S. J. Fowler proves that he was sent by Kirkley to Mrs. Kirkley, the plaintiff, several times to get money to pay for hay bought by him.

Then his declaration to several persons, to all from whom he bought, that he was buying for his wife.

Proof of agency by parol and power of attorney.

The defendant contends on the other hand, that the hay was the property of James Kirkley; that the plaintiff's claim is a sham, and a fraud upon James Kirkley's creditors; that James Kirkley failure in 1878, and all of his property, personal and real, was sold, and he was left indebted thousands of dollars, and that he continued his business the same as he did before the failure,

only adding to his name the word "Agent." That the plaintiff had no means of her own to engage in business, and only derived from loans small sums of money, which were insufficient to carry on such large purchases of hay as were handled by her husband. That the sums she borrowed from the bank and different persons were all absorbed in purchases of real estate which she made.

That Kirkley being agent for his wife was unknown to most of the citizens of the neighborhood.

That portions of hay bought at the time he alleged he was agent for his wife were sent to Philadelphia to commission merchants and charged by them against his old debts, or otherwise went to his credit.

That Mrs. Kirkley admitted to one of the witnesses that the property was put in her name to keep off husband's creditors.

The point of the case is, is this engagement in business by the plaintiff, Mrs. Kirkley, a real *bona fide* engagement in business, or is it, as is contended by defendant, a sham and fraud upon her husband's, Jas. Kirkley's, creditors? As you find this fact will determine for which party your verdict should be. The law of the case is this: Prior to certain Acts of Assembly, beginning in 1865 and running up to this time, a married woman could have no property distinct and separate from her husband. It was as limited and controlled exactly as it was at common law. A married woman had really no legal rights of property. But in 1865 and in several succeeding legislatures, the General Assembly has passed laws releasing and emancipating married women from this marital bondage. They began first by releasing certain property from the control of her husband, relieving it from liability for her husband's debts, &c. Then in 1871 they released certain money and other personal and real property from liability for her husband's debts, leaving it liable for her own debts. Then in 1873 they passed a more enlarged act, amended* in 1875, protecting her property from

* NOTE.—Amendment of act of 1873, by Chap. 165, of 1875, is in following words:

That the real and personal property of any married woman, which has been heretofore acquired, is now held, or which she may hereafter acquire in any manner whatever, from any person, other than her husband, shall be her sole and separate property, and the rents, issues and profits thereof shall not be subject to the disposal of her husband, nor liable for his debts.

her husband's debts, and releasing it from his control and putting it altogether under her own control and management.

These two acts gave her power to sue, and made her liable to be sued, and made it lawful to make any and all contracts necessary to be made with respect to her own property, and suits by her and against her might be maintained as though she was a "femme sole" *i. e.*, a single woman. The effect of this amended act is that she can, with her own money or property, become a trader, merchant, or in fact follow any of the occupations or business of life, and with the same rights, powers and liabilities as though she were a single woman, or as though she were *a man.* The plaintiff therefore had, under our law, the right with her own money, to enter into the business of buying and selling hay. Though a married woman, she was a *femme sole* hay merchant, and we say, in the language of Judge Cooley in the case of *Rankin v. West*, reported in 25 Mich., that "the fact that the husband, by reason of financial embarrassments, is unable to carry on business and support the family in his own name, is no impediment to the wife's engaging in business for that purpose. It would seem, on the other hand, to constitute a very sufficient and laudable motive for her doing so."

If she then can carry on business for herself, she certainly can carry on her business through an *agent.* But it is objected that her husband cannot be her agent, or being so it is a fraud upon his creditors. We do not think so. What is more natural or more safe for the wife than that her husband should be the agent, in the management of her property or her business. He is bound by greater obligations for its careful and prudent management of it, than would bind a stranger. The legal capacity of the husband to be such agent has been recognized and admitted by all text writers upon the subject, and by the decisions of most of the States where they have what is called a "married woman's act," and where the question has been raised. Nor in our judgment is a business of the wife's thus carried on through the agency of the husband any evidence in itself in law of a fraud upon the creditors of such husband, even if its purpose was to keep the property from the reach of such creditors. If the entire capital was contributed by her from her separate estate, or by loans made by herself, and by profits in the business, how are the husband's creditors defrauded? They

have every remedy which they had before, and it is no cause of complaint that the wife chooses to make her own arrangements so that her husband's debts shall not be enforced against her purchases. And such arrangement, if the property was hers, is not fraudulent in law or fact. If the money, however, with which the hay was bought, was the husband's, or came from him, that would be a badge of fraud.

This you are to determine and decide accordingly.

(Reviewed authorities cited by defendant.)

Now as to what constitutes *Fraud*, and how it is to be proven. The law will not suffer or permit it to be inferred. It must be proven, actual fraud, or fraud in the ordinary sense and meaning of the term is never presumed by law to exist; it is a matter of *fact* to be proved to the satisfaction of the jury by the evidence in the case; and such proof must be made by the party alleging, asserting and relying upon it. This proof usually consists in proof of acts or conduct which the courts call *badges* of fraud. It is impossible to get direct proof of it. No one is foolish enough to admit that he is committing a fraud. It is for the court to judge and decide what is such a badge. We have said that constituting the husband as agent is not such a badge; neither do we think that the husband, it having been previously proven that he was the agent, had a power of attorney to attend to the business for his wife, that his selling, buying and attending generally to the business is such badge for such conduct was in the line of his agency.

This is all, gentlemen, which I think necessary to say on the law.

If your verdict should be for the plaintiff, the plaintiff is entitled to damages for the seizure and sale of the hay.

It was sold by sheriff for the sum of $659.50, interest from ——— 21, 1881, this sum then with its interest, is the proper measure of such damages.

If verdict, however, should be for defendant, your verdict should be simply not guilty, or for the defendant.

Verdict for plaintiff.

Martha C. Stimmel *v.* Samuel Brown.

Lateral Support by Adjacent Land — Excavation near Line — Establishment of Custom.

When the owner of land commences to dig a cellar, or other excavation, along the division line between his land and that of a neighbor, he must take care to protect the soil of the latter from crumbling, or falling, by its own weight, into the cavity; otherwise he will be liable for the damage sustained.

It is a right incident to the ownership of land, that it shall be laterally supported by the adjacent land. If this support be removed, the owner thereof is entitled to damages in an amount sufficient to restore the property to as good a condition of lateral support as before the excavation.

The *amount* of damages must be proven before allowed by a jury.

A special custom becomes established when it has been used so long that the memory of man runneth not to the contrary.

The conflict of testimony of credible witnesses, inhabitants of the same city, repels the idea of an established custom.

(*New Castle, May 21, 1885.*)

Action on the Case for injury to real estate by removing the lateral support to a house upon it. The circumstances upon which the action is based is as follows: The plaintiff is the owner of a lot and house at No. 820 Jefferson Street in the city of Wilmington, the latter being built on natural ground elevated about five feet above the street grade. The defendant, who is the owner of a lot adjoining on the north, had dug an excavation on his ground during the month of November, 1882, causing the fence and a three feet wide alley connected with the plaintiff's property to cave in and allowing it to remain in nearly the same condition until the present time, decreasing the amount of rental and the value of the property. Martha C. Stimmel, the plaintiff, testified to the facts as above set forth and that while the defendant was making the excavation, she complained to him about it, to which he replied that he was going to dig down as far as he pleased, and she would have to put up a brick wall on the line to prevent the alley from caving in on the line of it.

Other witnesses were examined by the counsel in the plaintiff's behalf as to the foregoing facts, and as to the amount of damages sustained by her, and the cost of a brick and stone wall necessary to support her ground and prevent it from caving in.

The defendant testified that he believed his action right in excavating as he had done, that neighbors told him he had a

right to dig down and grade the ground on his side perpendicularly up to the division line of their two lots, and the plaintiff would have to prevent her side from crumbling and caving in on his land.

Counsel for the defendant produced several witnesses, who were prominent builders and contractors of the city of Wilmington, by whom he proposed to prove that it was a universal custom in that city, that where the owner of an adjoining lot cut down his ground on the dividing line, as in this case, the adjoining owner has to build the wall to prevent his ground from crumbling and caving in on the other's land.

Nields, for the plaintiff, objected to admissibility of the evidence, and contended that according to the common law of England engrafted into the Delaware state constitution in 1776, lateral support to land was an evident right to-day, and that evidence of custom could not be admitted.

THE COURT admitted the evidence, and desired the question to be argued. Witnesses in behalf of the plaintiff were examined to prove a custom to the contrary.

Benjamin Nields, for the plaintiff: Lateral support is a common law right. *Dodd v. Samuel and James Holmes*, 28 Eny. Com. Law, 240; *Hilton v. Whitehead and Andrew*; *Lasalan and others v. Halbrook*, 4 Paige Ch., 8. The plaintiff is entitled to damages arising from the falling of the natural soil, where caused by excavations made by the defendant. *Thurston v. Hancock*, 12 Mass., 220 (1815.) The right to lateral support must be regarded as an incident to the land. It is a right of property necessarily and naturally attached to the soil. It has been well said that the negative of this principle would be incompatible with the very security of property as it is obvious that if the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone. *Furand v. Marshall*, 19 Barb., 310; 211 Barb., 409 (1885).

There is an incident to land in its natural condition a right to support from the adjoining land; and if land not subject to artificial pressure sinks or falls away in consequence of the removal of

such support, the owner is entitled to damages to the extent of the injury sustained. The measure of damages in such a case is not what it will cost to restore the lot to its former situation, or to build a wall to support it, but what the lot is diminished in value by reason of the acts of the defendant. 25 N. J., 356 (1 Dutcher, 1856.) Land is entitled to lateral support and it is not incumbent on the plaintiff to show that the excavation from which injury results was made in a careless, negligent and unskillful manner. *Foley v. Wyeth*, 2 Allen, Mass., 131, 1861. In a suit for unlawful excavations adjoining plaintiff's land, the cost of a wall necessary to prevent the land from caving is an element of damages. *U. S. Digest*, '82, 758; *Aaron v. Fox*, 78 Ind., 1.

A land-owner is entitled to the lateral support of the adjoining land in a public street and to damages for the removal of such support in grading the street. U. S. Digest, 82, 258; *Dyer v. St. Paul*, 27 Minn., 457.

If a person by carelessness in making an excavation in his own ground, caused the fall of or injury to a house erected on the land adjoining, he is liable in damages for the injury. *Balto. & Potomac R. R. v. Reaney*, 42 Md., 117; U. S. Digest, '76, 723.

George Gray, for the defendant: The custom must at least have existed long enough to be generally known, 1 Bouv. Law Dict., 463; 2 Greenl. Ev. Sec., 248, 249; *Harrison, J., opinion in Furand v. Marshall*, 19 Barb., 380; 4 Comst. Rep., 195, 202; 17 Johns, 92, and cites as to damages, 1 Compt. & Jorv. Exch. Rep. 29.

The Court, Comegys, C. J., charged the jury:

It would be reasonable to suppose that the question, raised in this case, had been, before, made in the courts of this State; but there is no evidence to support such supposition, and therefore it is to be treated as a new one for decision. What are the rights, duties and liabilities of adjoining owners of real estate, with respect to each other, in matters concerning the use and enjoyment of such estate? That is such question. The plaintiff and defendant are, respectively, owners of lots of ground in the city of Wilmington on Jefferson street, between Eighth and Ninth streets, which

adjoin each other. They are small lots with a frontage on Jefferson street each of twenty feet. Prior to the act of the defendant, the consequences of which are the cause of action in this case, the lot of the plaintiff had been built upon by the erection of a dwelling house with back building and cellar, which constituted the residence of the plaintiff and her family. The grade of Jefferson street was about five feet below the level of the ground on which this house was erected—which ground was not disturbed as to its grade. In 1882, the defendant, desiring to build on his ground, and intending to conform his lot to the level of the street grade, proceeded to dig down his ground up to the dividing line between the two lots, in consequence of which the fence which the plaintiff had erected between them fell down and the earth crumbled also so much as to render her alley between the dwelling and the line practically useless—the pavement upon it being displaced, and also a waste pipe, or conduit, for the discharge of surface water and the house drainage. To supply the service of the latter, it became necessary to make another drain, and this time it had to pass through the cellar. Access to the back building and from it to the street, was made so difficult by the damage, that the main building had to be used for that purpose. The dwelling house covered the breadth of the lot with the exception of three feet and a quarter of an inch; and this was the width of the alley. While the excavation was going on, with the damage as it progressed, the plaintiff complained to the defendant of the consequences of his act and denied his right to dig away his soil up to the line without building a wall of stone to prevent the crumbling; the defendant, on the other hand, insisted upon his right, and contended that if the plaintiff wished to protect her property, she must do it at her own expense, as he was not bound to do it for her. Thus the parties raised themselves, out of court, an issue in law, and that issue has been transferred by them, by appropriate proceeding, to be tried and settled before and by us and you, in the tribunal of the Superior Court.

The case is one of unusual importance, as it presents, as has been before said, for the first time, the subject of the respective rights of owners of adjacent lots of land to the support each parcel is entitled to have from the other. Perhaps the best mode of in-

structing you about the law, is to give you examples where it applies.

Two men are owners, respectively, of adjoining lots in a city or town, which are both in their original state—that is, not built upon. One wishes to build, and chooses to do so, along the dividing line between himself and his neighbor. In the prosecution of his purpose, if he dig a cellar or make other excavation on the line, or near it, so that the soil of his neighbor, by its own weight, falls into it, he will be answerable for the damages, resulting therefrom, to his neighbor. But if his neighbor have placed some structure, or erected some building on his land, which falls or becomes injured by reason of its being erected so near the line as to contribute by its weight to the crumbling of the soil, he can recover nothing for such injury, in the absence of proof of carelessness, negligence, or unskillfulness in the execution of the work. This, however, does not apply in the case of a building, or structure which has been erected for more than twenty years; in which case, the owner has, in contemplation of law, the right of security against excavation upon the adjoining land after that period, the same as if one person had been, originally, the owner of both parcels, and granted one with the express right of erecting buildings upon it at or near the line as his grantee might choose, and that they should not be injured or affected by erections or excavations upon the other, and had granted that other, subject to the terms in the deed for the former.

By the law of the land, an owner of real estate has the right to all above and all below it; and, consequently, may do as he pleases with his own. But this right is subject to the qualification that he must not exercise it to the detriment, or injury, of an adjoining owner's right. An owner has the right to his own soil, but no more than his neighbor has to his soil. Therefore it is that in using or exercising this property right, no injury must be done to the others right. This is a maxim of the law. Hence when an owner commences to dig a cellar or otherwise along the division line between his land and that of a neighbor (which he has a perfect right to do) he must take care to protect the soil of the latter from crumbling, or falling, by its own weight, into the cavity. If he make such protection, then the land of the neighbor has received

no injury; but if such protection be not afforded, he is answerable for all damage resulting from such neglect; for, "among the rights which adjacent proprietors of lands may have to enjoy the benefit of their contiguity, is that of having one parcel laterally supported by the other. It is a right incident to the ownership of the respective lands, rather than an easement which one has in the other." *Washburne on Easements and Servitudes* (1863), page 429, Chap. IV.

To the plaintiff's complaint of grievance, the defendant pleads that he was justified in doing the act complained of, by reason of a special or particular custom, prevailing in the city of Wilmington, that in a case like the present, the party whose lot is to be injured by an excavation of contiguous soil, if he wished protection to his own soil against such excavation must furnish it himself, and with his own means. It is proper you should understand what, in law, a custom is; for the defence in this case is of this plea alone. There is no denial of the act done; it is admitted by the plea, which confesses it, but seeks to avoid the effect of it by reliance upon the alleged custom.

Customs are of two kinds—general and special. General customs are such as apply to the whole community or State; they are the common law of that State, or kingdom. Our ancestors who settled this country were chiefly English, and brought with them,for their government in the social state, the common law of England; that is, the law not passed by any legislative authority, but which had its origin in consent. Most of our law is of this nature. Wherever a free people "consent and use a certain rule or method as a law, such rule, etc., gives it the power of a law, and if it is *universal*, then it is the *common law*; if particular to this or that place, then it is *custom*." *3 Salk, 112.* "As to the rise of customs, when a reasonable act once done was found to be good and beneficial to the people, then they did use it often, and, by frequent repetitions of the act, it became a custom, which being continued time out of mind, it obtained the force of a law to bind the particular places, persons and things concerned therein. This custom had beginning and grew to perfection." *Jac. Law Dic.*, Vol. 2, 171. But to make a special or particular custom good, it must "have been used so long that the memory of man runneth not to the contrary." *Co. Litt.*, 113. Thus, although it should be established

that a particular custom prevailed in any place, yet, if the origin of the custom could be shown to be within the legal period of memory (which is one of several hundred years), it would be no good custom. Id. But, to establish in any case a particular custom, it must appear in some way that it had its origin in *common consent;* the fact of its being disputed, at law or otherwise, is a proof that such consent was wanting. It must have been acquiesced in, and not subject to contention and dispute. *Co. Litt.*, 114.

With this statement of what is necessary to establish a particular custom, it is quite plain, if the plaintiff's witnesses are to be credited, that no such custom as that upon which the defence relies, exists. The fact of conflict of testimony by the witnesses, inhabitants of the city, repels the idea of custom, which is law by consent. There can be no consent, such as the maintenance of a custom requires, where some of the alleged consenting parties deny or dispute the custom. The defence therefore fails, and the sole question for you is, what amount of damages ought to be given to the plaintiff. You have heard a great deal of testimony upon this point. Looking at the matter from a general point of view, we say that the measure of damages is what it would have cost the plaintiff in May, 1883, the time when the suit was brought, to restore her property to as good a condition, and as good a state of protection by lateral support, as it had before the excavation was made. If you think, with many of the witnesses, that a stone wall was necessary to make such support, you may allow for such wall. You have been told what the expense of such restoration, stone wall and a fence upon it would be. The estimates do not vary much. You may also allow the plaintiff, if you think proper to do so, for any other damage she has shown to have been a necessary consequence of the defendant's act, provided the value or amount of such damage has been proved by the testimony, but you are not to consider any claim of damage unless proof not only of it has been satisfactorily made, but also of the value of it in dollars and cents. In no case of claim for damages in an action like this, are any, beyond the nominal verdict of six cents, to be allowed, unless proof be made of what they consisted, and their value or amount.

Verdict for the plaintiff.

COURT OF ERRORS AND APPEALS,

JUNE TERM,

1885.

JOHN V. RICE, late trading as JOHN V. RICE & CO., defendant below appellant, *v.* SAMUEL W. MCCAULLEY, plaintiff below, respondent.

Beginning of Suit—Action Pending.

An Act of the Legislature, passed April 6, 1881, provided that the provisions of said Act should "not apply to any civil action or proceeding pending at the time of its passage."

A writ of summons was issued out of the Superior Court, February 23, 1881, returnable to the May Term following; and on May 15, 1881, said writ was returned "*non est inventus.*"

An *alias* summons was afterwards issued and service thereon obtained. *Held*, at the trial, that the issuing of the writ on February 23, 1881, constituted an action pending for the purposes of the said Act, and that the *alias* summons, in legal effect, was a continuation of the first writ.

(*June 3, 1885.*)

ERROR to the Superior Court in and for New Castle County. Heard before SAULSBURY, CH., and HOUSTON and WHITELEY, J. J.

A writ of summons in *assumpsit*, against the plaintiff in error, was issued at the instance of the plaintiff below on February 23, 1881, returnable to the following May Term of the Superior Court in and for New Castle County.

This writ was returned May 15, the first day of the term, "*non est inventus.*"

On May 25, an *alias* summons was issued, returnable to the November Term of the Superior Court, and was returned November 25, "*summoned personally.*"

On April 6, 1881, in the interval between the issuing of the first writ and the issuing of the second, the Legislature passed the following act:

"SEC. 1. No person shall be incompetent to testify in any "civil action or proceeding whether at law or in equity, because he "is a party to the record or interested in the event of the suit or "matter to be determined * * * ."

"SEC. 2. The provisions of this act shall not apply to any "civil action or proceeding pending at the time of its passage."

16 Del. Laws, 708.

At the trial of the cause, in December, 1882, the defendant offered himself as a witness in his own behalf.

Counsel for the plaintiff objected to his competency on the ground that the issuing of the writ of February 23, constituted an *action pending*, at the time of the passage of the above act; and on this ground the court rejected the defendant as a witness.

To this ruling the defendant noted an exception and took a Writ of Error. The question before the court, therefore, is whether or not the writ of February 23, which was returned "*non est inventus*," constituted an *action pending*, within the meaning of the exception contained in the Second Section of the above act.

John B. Moore, for plaintiff in error:

The *pendency* of an action means more than simply the commencement of an action. It is a term of greater intension, and suggests to the mind a larger number of attributes.

The vital idea of an action is a proceeding between parties, in a Court of Justice, for the purpose of determining some right, which is in dispute between them. The constituents of an action are a court, parties and a subject-matter.

The term *pending* means "depending," "remaining undecided," " in suspense."

Taking the two words together, an *action pending* means that there is some matter in controversy between parties in court, which has not yet been decided.

Pendency relates to the continuance of an action with respect to its decision or end, rather than to its continuance with respect to

its commencement. In relation to the pendency of an action, the commencement of an action may mean the commencement of the *proceedings that produce, or result in, pendency,* and therefore it is not equivalent to the commencement of the state of pendency.

The rule in chancery is that *lis pendens* begins from the *service* of the *subpœna.*

Murray v. Ballou, 1 Johns. Ch., 576; *Lockwood v. Bates et al.,* 1 Del. Ch., 435, 447.

In the civil law, an action is not said to be pending till it reaches the stage of *contestatio litis.*

2 Bouvier's L. D., Art. Lis Pendens.

The constituents of a pending action, or suit, are discussed in *Gregg v. Banner,* 2 Harr., 407, 411.

An action cannot, except by a fiction of law, be said to be pending, until the service of the writ, although the writ contains the declaration, and the issuing of it is considered the commencement of the action.

Clindenin v. Allen, 4 N. H., 385.

While there might be differences of opinions as to the particularity required, in the statement of the cause of action, to constitute pendency, the absolute essentiality of parties is very manifest. The case of *Gregg v. Banner, supra,* is a strong *a fortiori* case on this point.

To speak of an action as pending—"remaining undecided"—implies that the action is in the possession of a tribunal having power to decide it.

It is a universal principle that a court has no jurisdiction of an action, and consequently no power to decide it, until it has jurisdiction of the parties.

"In every court," says Blackstone, "there must be at least three constituent parts, the *actor, reus* and *judex.*

3 *Bl. Com.,* *25.

Until those constituents exist, the Court has no jurisdiction of the action; and without jurisdiction, no action can be said to be pending.

It is submitted, however, that under our practice, according to which the writ of summons contains only a most general statement

of the form of the action, an action is not, strictly speaking, pending until the filing of the declaration.

It was passed to aid in the administration of justice. It is, therefore, to be construed liberally, and the exception strictly.

The act is peculiarly applicable to the trial of causes, and the reasonable inference as to the intention of the Legislature in employing the term pending in the saving clause is, that it was deemed expedient to except from the operation of the act actions actually pending in court, where the parties had, perhaps, prepared their cause for trial, and arranged their proofs, with reference to a different rule of evidence.

It is stated in a general way by law writers that the prevalent rule in the United States is, that the issuing of the writ is the commencement of the action. But an analysis of the cases will show.

1. That in perhaps most of the States the commencement of actions is regulated by express statutory provision.

2. That the forms of process vary greatly and may thus in a great measure have determined the rule.

3. That they do not decide that the issuing of the writ, independently of subsequent service, is the commencement of the action, unless in the case of the Statute of Limitations, or cases analogous.

This fact, taken in connection with the fact that the rule must depend upon the peculiar practice and the statutes of each State, would make a particular inquiry as to the rule in each State as fruitless, as it would be tedious and in great part irrelevant.

Admitting, however, for the sake of the argument, that the term *pending*, as used in act of April 6, may be taken to relate back to the commencement of the action, it remains to consider the question, *when was this action commenced?*

The rule as to what constitutes the commencement of an action has varied greatly in accordance with the practice in different courts.

Burdick v. Green, 18 Johns, *14, 20; *Treadwell v. Lawlor*, 15 How. Pr., 9; *Clark v. Helms*, 1 Root, 486; *Federhen v. Smith*, 3 Allen, 119; *Badger v. Phinney*, 15 Mass., 359.

In Massachusetts, however, the declaration is inserted in the writ and is a part of it.

Ilsley et al. v. Stubbs, 5 Mass., 280, 285.

In New Hampshire, the commencement of the action is dated from the issuing of the writ, but there, as in Massachusetts, the writ contains the declaration.

Clindenin v. Allen, supra.

That the difference in the forms of process is material, is made manifest by comparing the rule as to the commencement of actions in the Common Pleas in England, with the rule that existed in the court of King's Bench.

In the C. P., where the action was commenced by an original writ, the issuing of the *capias* was considered the commencement of the action.

Leader v. Moxon, 2 Bl. Rep., 925.

In the K. B., where a *latitat* was used to bring the defendant into court, the filing of the bill, or declaration, and not the issuing of the writ, was the commencement of the action, except in the case of the Statute of Limitations.

Swancott v. Westgarth, 4 East, 75; and cases cited.

The original in the C. P., on which the *capias* was founded, consisted of a statement of the complaint and a demand upon the defendant to satisfy it, and upon the refusal of the defendant to do so, process was issued to compel him to answer.

App. 3 Bl. Com.

But in the K. B., the writ of *latitat* was regarded as merely process to bring the defendant into court.

Swancott v. Westgarth, supra.

It thus appears that both service of process and a declaration were required in both courts to constitute the commencement of an action; for in the K. B. the action was not deemed commenced until the filing of the bill, and in the C. P. the *capias* presupposed, and was founded upon, a refusal on the part of the defendant to comply with the command of the court to satisfy the plaintiff's demand.

Aside, therefore, from any statutory provision, by analogy to the rules in the English courts, the filing of the declaration, and not the issuing of the writ, would be the commencement of the action in this State.

By a statutory provision, however, the writ is made the commencement of the action.

"Every writ used for the commencement of an action, shall "bear date on the day it was issued, and shall be returnable on the "first day of the term next thereafter."

Rev. Code, 633, Sec. 1.

It is furthermore admitted, that under this statute the date of the issuing of the writ that commences an action, may be considered the date of the commencement of the action; but it is submitted, that the statute does not make the simple issuing of the writ, independently of subsequent service, the commencement of the action. A writ may be issued and returned, and yet no action commenced.

It is the peculiar office of the writs mentioned in the statute, to bring the defendant into court; and it is in this way that they commence the action.

It is by the service of the writ that the court acquires jurisdiction, so as to proceed in the action, although, if the writ prove effective, the action may be considered as commenced from the time the writ was issued.

But if the writ, which was issued to bring the defendant into court, fails of its object, and is returned *non est inventus*, the court has no jurisdiction and there is no action commenced.

There is an *ex parte* proceeding, an act of diligence, a commencement *sub modo*, which would suffice to save the plaintiff from the bar of the Statute of Limitations. But in that, and in no other sense can it be said that there is an action commenced.

If the first writ, the writ of February 23, commenced the action, where was the necessity for a second writ, and where was the authority to issue it?

An action cannot be commenced by two writs, and if two writs are used for the commencement of an actior, the action must be taken to be commenced by that writ which proved effective. A second writ for the commencement of an action can be issued only on the ground that the first writ has proved ineffective and is *functus officio*, in other words, on the ground that the action has not been commenced.

3 Bl. Com., 279, 280.

But under the practice in this State an *alias* writ of summons has no interior and vital connection with the first. It is simply a matter of convenience. The court is not brought a single step nearer to the determination of the cause by the first writ, nor is it put into the possession of the cause by it, so as to take steps towards its determination.

So far as the action itself is concerned, the writ that is served, whether *alias* or *pluries*, is the original writ in the action.

It has been so denominated in our practice.

Rev. Code, 645, Sec. 4.

The true and actual commencement of an action by the writ that proves effective, as contradistinguished from the constructive or fictitious commencement of an action by a writ that proves (for all other purposes) ineffective, is the only sort of commencement to which pendency can by any stretch of meaning be made to relate.

It is an utter misinterpretation of terms to say that when the writ of February 23 was returned *non est inventus*, there was an *action pending*.

Anthony Higgins, for defendant in error:

1. The issuing or sueing out of the writ is considered the commencement of the action.

1 Tidd. Pr., *14, Note (A) and cases cited; *Carpenter v. Butterfield*, 3 Johns. Cas., 145; *Bishop v. Wilds*, Admr., 1 Harring., 97; *Bunker v. Shed*, 8 Metc., 150; *Gardner v. Webber*, 17 Pick., 407; *Ford v. Phillips*, 1 Pick., 202; *Burdick v. Green*, 18 Johns., 14; *Caldwell v. Heilshu*, 9 Watts & S., 51; *Beckman v. Scatterlee*, 5 Con., 519.

Issuing the writ is a good commencement of the action to prevent the bar of the act of limitations:

Bunker v. Shed, 8 Metc., 150; *Gardner v. Webber*, 17 Pick., 407; *Haughton v. Leary*, 3 Der. & Batt., 21; *Burdick v. Green*, 18 Johns., 14; *Day v. Lamb.*, 7 Vt., 425; *Jackson v. Brooks*, 14 Wend., 650.

Or, to prevent the defendant setting off a promissory note assigned to him after the issuing of the plaintiff's writ.

Evans v. Prosser, 3 T. R., 186; *Carpenter v. Butterfield*, 3 Johns, Cas. 145; *Haughton v. Leary*, 3 Dev. & Bat., 21.

2. The first writ of summons was the commencement of the action:

The *alias* writ which recites the first writ, was merely its continuation and therefore the action was pending from February 23, 1881, the date of the issuing of the first writ.

1 Tidd Pr., 128, 154; *2 Tidd.*, 1124; *Angell on Limitations*, 339; *2 Saund. Plead. and Ev.*, 1302; *Harris v. Woolford*, 6 T. R., 617; *Parsons v. King*, 7 T. R., 6; *Stanway v. Perry*, 2 Bos. & Pul., 157; *Pennock v. Hart*, 8 Serg. & R., 369; *Bank of Orange Co. v. Haight*, 14 Wend., 83; *Davis v. West*, 5 Wend., 63; *Etheridge v. Woodley*, 83 N. Car., 11.

3. The uniform practice in this State has been to award an *alias* or *pluries* summons on a return of *non est inventus* on the prior writ or writs, and to treat the first writ as the commencement of the suit, and as an integral part of the suit for all the purposes of the case.

(1.) The costs of the first writ are always taxed on a judgment where the defendant is brought into court under an *alias* writ.

(2.) Where an affidavit and copy of the cause of action are filed under the first writ, the practice is to give judgment for want of an affidavit of defence without requiring the affidavit and copy to be filed under the *alias* summons on which the defendant appears.

(3.) Judgment in *Scire Facias* on mortgages are constantly taken under an *alias* writ with two returns of *nihil.*

This practice has been judicially approved by this court, and the rule was laid down that it is not a fatal error if the last writ of *Scire Facias* do not refer to the first.

Bauduy v. Bradun, 1 Harring., 182.

Houston, J.:—This is purely a question of law involving the construction of the words of a statute passed by the legislature on the 6th day of April, 1881, providing in the first section that no person shall be incompetent to testify in any civil action or proceeding whether at law or in equity, because he is a party to the record or interested in the event of the suit or matter to be determined, and in the second section that the provisions of the act shall not apply to any civil action or proceeding pending at the time of the passage of the act; and the only question to be determined in

the court below was whether a writ of summons issued in an action of assumpsit out of the court below at the suit of McCaulley against Rice, on the 23d day of February, 1881, returnable on the first day of the next May Term of that court, and returned on that day, the 15th of May, 1881, by the sheriff *non est inventus*, constituted without a service of the writ on the defendant in it, any civil action or proceeding in the suit pending at the time of the passage of the statute within the meaning of that word as thus employed in it? An *alias* summons was issued on the 25th day of May in the usual form which was served and returned at the next term when the defendant appeared, and the case having been afterwards pleaded to issue on the trial of it, he was called as a witness to testify, and was objected to on the other side as incompetent because he was the defendant in the case, and the above question then having been raised the court below held that he was not competent witness in the case within the meaning and intention of the second section of the statute; and that is, of course, the same question of law now to be determined by this court, and which involves no question of equity whatever before this tribunal, any more than it did in the court below.

It is admitted by the counsel for the plaintiff in error that under our general statute and the established practice of the Superior Court of this State, the writ or summons first issued in this case constituted in law the commencement of the action, but his contention is that, as it was not served on the defendant and was returned *non est inventus* to the next term of the court, it failed to have any legal effect whatever, and therefore there was not any civil action or proceeding in the suit so commenced on the 6th day of April, 1881, when the statute was passed. Or, in other words, that without service of the summons first issued upon the defendant in it, there was, according to the technical signification of the terms, no *lis pendens* in the case at that time.

The first authorities cited by him for the rule on this subject and in support of the point made by him were *Murray v. Ballou*, 1 Johns Ch. Rep., 566, and *Lockwood v. Bates et al.*, 1 Del. Ch. Rep., 435; both cases in chancery where the rule upon a principle of equity purely has long been recognized and established with greater uniformity in the decision upon it, than has been in the

courts of law, where no principle of equity was involved, but the time of the commencement of the action and whether it was barred by the plea of the statute of limitations, and in other similar cases, was the only material question involved in them in respect to the rule. In the case first cited of *Murray v. Ballou*, a bill was filed in the Court of Chancery of New York against a trustee of real and personal estate for the benefit of a married woman, by the latter for a breach of the trust, to enjoin him from acting as trustee, or selling any of the trust estate, or the securities or funds thereof, and for the appointment of a receiver. After the subpœna had been issued and served upon him in the case, he sold a portion of the real estate of the trust to Ballou and took his bond and mortgage for the consideration, which were afterwards assigned to another person by the name of Hunt, by whom the amount of them was subsequently paid to the trustee. A bill was afterwards filed in the court by the receiver against Ballou and Hunt to set aside the sale of the premises on the ground that they both had knowledge of the suit pending against the trustee when they purchased the premises, but which they denied in their answers. There was no proof to contradict the answers, but Chancellor Kent held that though he had no knowledge of the suit when Ballou bought the premises which had then been pending a year in the court, it was not pretended that he was ignorant of the existence of the trust, and it was to be presumed from his silence that when he purchased the land from Winter, he knew that Winter held and sold it, not in his own right, but as trustee. The bill charged that it was generally known at the time of the sale that Winter's authority was questioned. The answer went no further than to deny any knowledge of the chancery suit, or of the injunction, or of any suspension or defect of authority in Winter to sell. The answer of Hunt was to the same limited extent; and the probability was that it was a matter of public notoriety at the time that Winter held the large real estate in his possession as a trustee. And after some further comments on the circumstances of the case the chancellor proceeds to his conclusion, as follows:

"Admitting that Ballou had no knowledge in fact of the suit when he made the purchase, he is nevertheless chargeable with legal or constructive notice, so as to render his purchase subject to the

event of the suit. The established rule is that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the *subpœna* after the bill is filed. And which he further says was no more than an adoption of the rule in a real action at common law, where if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation." And the reason for which we may add both at common law and in chancery is that when the suit involves the right of the plaintiff to real estate in the possession of the defendant in it, the jurisdiction of the court over it forbids that the adjudication of his right to recover it according to law or equity, shall not be prevented or defeated by the defendant; sale and conveyance of it to another during the pendency of the suit.

And to the like effect was the decision of the Court of Chancery in this State on the same rule in the second case cited, *Lockwood v. Bates, et al.* For our present purpose it is enough to say of the facts established in that case that a bill had been filed in the Court of Chancery at the suit of James Clayton, Samuel Lockwood and Armwell Long, three members of the firm of Mitchell, Lockwood & Co. against John Mitchell, the remaining member of it, to obtain a settlement of the affairs of the partnership by Mitchell who had been the active partner. The cause was proceeded in to a hearing at the August Term, 1823, and the final decree of the Chancellor was entered in it on the 8th day of August, 1825. By it the rights of the several partners were adjudged, and the defendant, Mitchell, was ordered to pay to them their several shares of the net partnership assets. As part of the decree, he was ordered to pay to Samuel Lockwood, one of the partners, the sum of $1,818.95. Pending the suit for the settlement of the partnership, Samuel Lockwood was indebted to John Mitchell in a judgment bond for the real debt of $3000, dated December 3d, 1817, on which judgment was entered in the Court of Common Pleas on the 9th of January, 1819, subject to a credit of $1,000 on the judgment as of February 11th, 1818, but leaving with the interest in arrear a balance due to Mitchell larger than the sum due from him to Lockwood under the decree in the partnership suit. On the 8th of December, 1824, while the partnership

suit was pending, Mitchell executed a written assignment of the judgment he held against Lockwood, to Martin W. Bates, in trust for certain creditors of Mitchell. Notice of this assignment was given to Lockwood on the 5th of November, 1825, and on the 22d of June, 1830, the judgment was marked on the record "for the use of Martin W. Bates, as per assignment to him dated the 8th of December, 1824."

Several years afterwards Samuel Lockwood filed his bill in the court against Martin W. Bates and others, setting forth the above stated facts, and prayed that he might have the benefit of the decree made in 1825 in the partnership suit, by way of set off against the judgment due from him to Mitchell, and now standing for the use of Martin W. Bates in trust. The answer, admitting the facts set forth in the bill, relied upon three grounds of defence, but only one of which it is necessary for us now to notice, and that was, that the assignment of the judgment against Lockwood in trust for creditors having been made on the 8th day of December, 1824, prior to the decree in the partnership suit in 1825, the rights of Lockwood's creditors under the assignment could not be affected by the subsequent decree against Mitchell, the original judgment creditor. The chancellor held that Lockwood, the complainant, was entitled in a court of equity to set off against the judgment assigned to Bates for the creditors named of Mitchell, the sum decreed to be paid to him by Mitchell in the partnership suit, and as what he said on this part of the case in announcing his opinion is well and more concisely expressed in the syllabus of the report of it, we will quote from it his ruling in it on the particular question we are now considering. It is as follows:

"A *lis pendens* is constructive notice, not only to affect purchasers of the subject matter of the litigation, but also to protect all rights and equities arising out of it. In the present case the pendency of a suit in equity resulting in a decree for the payment of a partnership balance by the defendant to his co-partner, which the latter sought to set off against a judgment due from him to the defendant, *held* to be constructive notice of the co-partner's equity to an assignee of the judgment who took pending the litigation."

We have thus referred particularly to two cases in chancery cited in support of the construction of the words of the statute

contended for in this case by the counsel for the plaintiff in error, to show the meaning and purpose of the rule of *lis pendens* when resorted to by courts of equity, and why it has been held in courts of equity that the subpœna must not only have been issued on the filing of the bill, but must also have been served upon the defendant in the case, to warrant the application of the rule of *lis pendens* to it; and the reason for that was that where an innocent purchaser for a fair and valuable consideration and without any knowledge that it was a subject matter of litigation in a suit, bought a tract of land of the defendant, and there was no proof that such a purchaser, or that even the defendant then had actual notice or knowledge that the suit had been commenced against him, no court of equity could have ruled that either had constructive notice of it, until the subpœna had been served upon the defendant, but the service of it being actual notice to him that the suit had been instituted against him, they were prepared to hold, and have for a long time firmly held, that it constituted constructive notice of it, even to such a purchase; and as the hardship of the rule in such a case was strongly pressed upon the consideration of Chancellor Kent by the counsel for the purchasers in the case before him, much of his opinion was devoted to the support and vindication of it in that case. And in the second case cited, as the partnership suit had proceeded to a hearing before the chancellor on the bill and answer filed, and was awaiting his final decree in it when Mitchell's judgment against Lockwood was assigned to Bates, in trust for the creditors of the former, and which without the relief sought in the subsequent suit in that court by Lockwood against the assignee, Bates and others, with such notice of the subject matter of the litigation between Lockwood and Miller in the partnership suit, as would have defeated Lockwood's equitable right of setting off the sum due to him from Mitchell under the decree against the judgment, the reason was the same for the chancellor's holding that as the assignment was made pending the partnership suit, it was constructive notice to the assignee of the judgment of Lockwood's equity to set off the sum due him from Miller, the assignee of it, against the judgment.

But in the case now before us, commenced and prosecuted as it was with all due diligence in the established mode of procedure

in such cases to verdict and judgment in the court below, there is no question involved as to either actual or constructive notice of the institution of it to the defendant, or particularly, to another person to whom he had conveyed or assigned his interest in the subject matter of it, with the view of defeating the recovery of the plaintiff by thus divesting himself of his interest in it after the commencement of the action; and therefore the rule of *lis pendens*, as stated and applied by Chancellor Kent in the case referred to, can have no application to the case before us, and it is equally manifest that it could not have any application to even a real action at common law whence courts of equity originally derived it, without such a conveyance of his interest in the premises to a third person pending the action, according to his exposition of the rule in that case. On the contrary, in this case in the court below the question simply was, and it is the same here, whether in the meaning and intention of the legislature as expressed in the words of the statute, the first or original summons in it having been issued prior to the passage of it, returnable to the next May Term of the court, which was after the passage of it, and remaining or hanging in the mean while in the sheriff's hands for service on the defendant who had no place of abode in the State, or where it could be served by his leaving a copy of it, and was not served, but returned *non est inventus* by him to the next term, it was, or was not a civil action or proceeding pending during that time, and particularly, at the time when the statute was passed, which was the 6th day of April in that year.

If the words of the act merely were "any civil action pending" at the time of its passage should be within the provision of the preceding section of it, although it would not even then be free from any doubt that the legislature intended to use the words in the technical sense contended for, and to constitute it a *lis pendens* it was, at least, necessary that the summons should have been served by that time upon the defendant, but the addition to them of the other word "or proceeding," renders the meaning of the legislature in the use of them in this connection, the more uncertain in that respect. For a civil action of any kind in the courts of our State, all of which are well known and ascertained in our practice, has a legal signification, as fixed an definite as can be claimed perhaps,

for any other legal names or terms, and in its general sense embraces all the proceedings of record in it from the original writ with which it is commenced to the verdict and judgment with which it concludes, when it has been regularly prosecuted and conducted through all the progressive stages of it from such a commencement to such a conclusion. It may, however, be terminated in various ways in the mean time, but until it is terminated, it is usual to say, even in court, and in language generally well understood out of it, that the action is pending, and which by a figure of speech in the terms of the civil law, "*lis pendens*," is likened to fruit forming and growing in the stages of its development, but yet *hanging* by its roots or stem. There are, however, other civil proceedings of several kinds in our courts of law in which the testimony of witnesses is required and heard, but which are not considered or denominated actions of law, because they are commenced without the issue and service of any original writ upon the other party, and prosecuted and conducted without any declaration or pleadings filed, as in all civil actions at law is prescribed and required in them. And in such a proceeding so commenced and conducted, it may well be doubted whether the rule of *lis pendens*, as defined and contended for by the counsel for the plaintiff in error, could be properly applied, because it was not commenced by an original writ served on the defendant, as in an action at law. And yet, it is quite as common in court, and out of it, to apply the term pending to such a proceeding so commenced, as long as it continues before the court undetermined, or undecided, as to an action of law continuing before the court in like manner; and the statute itself applies the same term "pending" to any civil proceeding as to any civil action, and we therefore think the legislature intended to use the word pending in the connection in which it is employed in this statute, in the general sense in which it is now used and understood, and not in any more limited or technical sense in which the terms *lis pendens* have been defined and interpreted in any of the cases cited in the argument by the counsel for the plaintiff in error.

We do not think that there was any ground for the contention of the counsel that on the return of the first summons without service upon the defendant in it, and *non est inventus* to the next term of the court, it was then *functus officio* and became a nullity and of

no effect for all the purposes of the action which he admits was commenced by it. For by the long established practice in the Superior Court of the State, a summons so returned by the sheriff does not become null and void, if, as in this case, an *alias* summons, or another like it, is thereupon issued returnable to the next term of the court, but it constitutes a repetition and continuation of the former in its legal effect, so that the commencement of the action in such case dates from the issuing of the first, and this practice was early adopted here in analogy to the practice in the courts of England, so far as it was applicable to the more simple mode of instituting actions in our courts. It was issued as an *alias* summons, reference being made in it to the original summons in the regular form usual in such cases, returnable to the next term, and it was no less the function and office of it to preserve the action as commenced by the original writ, than to effect what it had failed to have accomplished, the service of such process in the action upon the defendant.

But both in the courts of law in England and in the courts of law in this country in which it has been held in regard to the rule of *lis pendens*, and as a general principle, that the issuing of the original writ in it does not constitute the commencement of an action, they have all held to the contrary, when the time of the commencement of the action for any reason became material, as in the case of a plea of the statute of limitations against it, or of a tender, which must have been made before the suit was brought to be a legal defence, and in various other cases when it became material to determine when in point of fact the action was commenced; and in which it has uniformly been held that the issue of the original process in it was the commencement of the action. And such cases clearly show that notwithstanding the rule contended for, the courts in both countries have exercised a good deal of discretion in departing from it in their decision of them. And in this case which turns upon the interpretation of a recent statute of our State, and the meaning of the word "pending" merely, as employed in it, we think we are warranted for a like reason in holding that it was employed, not in the technical sense of the latin word *pendens* in the rule, but rather in the sense of the word

"commenced" in our language, in which it is more generally understood. For although it is not a statute of limitations, the section of it in question was solely to limit and restrict, according to the meaning of the word "pending" used in it, as we think, the initial operation and application of the act to civil actions or proceedings commenced after the passage of it, or, in other words, that it should not apply to any commenced before the time of the passage of it.

We therefore think that the judgment of the court below should be affirmed.

SAULSBURY, CHANCELLOR, dissents.

CLARENCE JAMISON *v.* LEONTINE J. MCWHORTER.

Devise—Trust Estate—Limitation to Children—Life Estate—Power to Mortgage.

A trust estate cannot be supported where no active duty is to be performed by the trustee, and the whole management of the property is in the hands of the *cestui que trust.*

The testator devised a certain farm to his executor in trust for certain uses, etc., and then directs as follows:

"To permit and suffer my son Clarence to use, occupy, and rent, and to receive the rents, issues, and profits of the said Capelle farm during the term of his natural life, for his proper use and benefit, and in case of the death of the said Clarence, leaving a child or children, or the issue of such, remainder to such child or children or the issue of such, their heirs and assigns, free and discharged from the aforesaid trust." "In case of the death of any of my said sons * * * without leaving child or children, or the issue of such, the share of the one so dying shall go to the survivor or survivors, or the issue of such, as may be deceased, subject to the same conditions, etc., as their own property."

The rule in Shelly's Case has no application. The limitation to the child or children of Clarence, who had none at the time, and to the issue of such of them as should be dead at the time of his death, leaving issue, is to the children as a class in remainder; and Clarence takes an estate for life and not an estate tail.

The will of the testator containing no authority to mortgage the premises to raise money for the maintenance of the sons, the Court of Chancery has no power to authorize the same, and no title can be acquired by the sale by the sheriff in execution of the mortgage upon the said premises.

Houston, J., dissents.

(*June 3, 1885.*)

CASE STATED on questions reserved by the Superior Court for New Castle County.

John H. Rodney, for plaintiff:

The case originates upon an agreement between the plaintiff and the defendant for the sale of land, and non-performance of that agreement by the defendant upon the ground of insufficiency of title in the plaintiff.

The plaintiff's title arises under the will of his father, Thomas Jamison (hereafter set forth), and involves the construction of that will presenting two principal questions:

1st. Whether the plaintiff took a life estate in the premises ("inter alia") in question.

2d. Whether, if so, that life estate has been enlarged by the subsequent devise.

The will of Thomas Jamison devises as follows:

"I give and devise unto my executor and the guardian hereinafter named and appointed for my minor children all my estate, real and personal, not herein otherwise disposed of, to have and to hold the same unto them or the survivor or survivors of them, *in trust* nevertheless for the uses, intents, and purposes hereinafter set forth and declared." Then as follows:—"To have and to hold the farm known as the Capelle Farm, containing about two hundred and twelve acres, situate in Red Lion hundred, in trust, to rent the same to good and careful tenants, at the best cash or share rents attainable, as in their judgments shall be most advantageous, and to collect, expend, and invest the same as hereinafter provided, until the majority of my youngest son who shall live to attain the age of twenty-one years." Then follows a provision to raise a charge upon the premises for the purpose of equalizing the estate among his children, and following that direction, then "To permit and suffer my son Clarence to use, occupy, and rent, and to receive the rents, issues, and profits of the said Capelle Farm during the term of his natural life, for his proper use and benefit, and in case of the death of the said Clarence, leaving a child or children, or the issue of such, remainder to such child or children or the issue of such, their heirs and assigns, free and discharged from the aforesaid

trust." Then follows,—"In case of the death of any of my said sons" (naming them), "without leaving child or children, or the issue of such, the share of the one so dying shall go (to) the survivor or survivors, or the issue of such, as may be deceased, subject to the same conditions, etc., as their own property."

It is admitted that the trustee has performed the duties specifically enjoined upon him, and that no guardian who in the will was named with the executor as trustee was ever appointed by the testator, but afterwards was by the Orphans' Court.

This therefore is a devise *first* to trustees for certain defined and specific purposes, whose duties and interest in the estate are limited.

It is a conceded principle of law that the estate of trustees continues only so long as the purposes of the trust require it. When the object and aim of the trust has been served, then the legal estate in the trustees ceases, and the person entitled to the beneficial interest takes it, even where there are words of inheritance in the devise to trustees.

In this case the trustees took the estate to manage until the majority of the youngest child, then to raise a charge upon the same for the purpose of equalizing the property, and after that to permit and suffer each son named to take the rents, issues, and profits, and use, occupy, and rent the same for his proper use and benefit,—these terms being stronger than many of the cases supporting the principle. It is admitted that the youngest child came of age May, A. D. 1878.

1 Powell Dev., 223; *1 Barn. & Cres.*, 360 (341); *2 Exch.*, 58 (593); *4 Exchequer*, 550 (569); *21 Penna. St.*, 81; *7 Term. Rep.*, 433, 652; *Hawkins on Wills*, 143; *6 Ad. & Ellis*, 860.

In this case, therefore, it is confidently assumed that when the youngest child arrived at majority, and the duties of the trustees had been performed, and the "*cestui que use*" directed to have the property, the legal estate vested in him, the devisee of the beneficial use, and vested in him as a legal estate for life. This reaches, therefore, the second point:

How did the estate for life vest in Clarence Jamison, the "*cestui que use*?"

The provision in the will directing the trustees "to permit and

suffer Clarence Jamison to take the rents and profits," etc., during his natural life, gives him an estate for life.

The property in question, which is mentioned in the agreement sued upon, is part of the Capelle Farm, and as such included in the above devise. This principle is intimately connected with and flows from the rule as laid down above as to the estate of the trustees.

In short, the duties of the trustee ceasing, and the direction being to permit and suffer the "*cestui que use*" to take the rents and profits, he takes the legal estate.

1 Powell Dev., 221; *12 East*, 455; *4 Taunton*, 822; *2 Taunton*, 109; *2 Salkeld*, 679; *2 Jarman* Wills, 202; *4 B. & Ad.*, 33; *6 Ad. & Ellis*, 860.

Upon these authorities and the language of the will, by implication of law, Clarence Jamison took an *estate for life*, as full and perfect as if specifically devised to him.

The next question is the principal one in the case, and upon it the determination of it depends. Undoubtedly the rule in Shelly's case prevails in this State. *Griffith v. Derringer*, 5 Harr., 484.

That rule is to the effect that if in any instrument an estate of freehold is given to one (say for life), and by the same instrument either mediately or immediately is given to his heirs either in fee or in tail, the second estate, whether fee or tail, vests in the first taker. In such cases those words are words of limitation, showing a continuance of the estate of the first taker; but where it is construed that the second taker takes not through or because of the ancestor, but directly from the testator, there the words are words of purchase and the rule does not attach.

The two estates must be of like character, *i. e.* both legal or both equitable; but it is submitted that the estate of Clarence Jamison is a legal estate, arising from implication of law.

The rule in Shelly's case applies equally where the ancestor takes a freehold by express limitation, by resulting trust, or by implication of law. *2 Kent Com.*, 215.

The question therefore now is, Does the rule in Shelly's case apply? and, considering the devise after the death of Clarence Jamison (he having a legal estate for life), are the words there used words of limitation or of purchase?

It is not denied that ordinarily the word "children" in a will is used as a word of purchase and not of limitation. Still, as courts have sometimes construed the word "heirs" and even "heirs of the body" to be words of purchase, so have the words "child" or "children" been construed as words of limitation, in order to effectuate the intention of the testator. The rule of construction is not so binding and absolute but that it may admit of variation.

Price v. Taylor, 4 Casey (Penna.), 95, Lowrie, J.

It will be remembered that at the time this will was made and went into operation there were no children "*in esse*." That, however, is only mentioned as a means to arrive at the intention of the testator,—showing that the words were not used as "*descriptio personarum*," and as such have no application.

The intention of the testator is that after the life estate and through the life tenant his descendents, children, *issue*, or heirs shall take, using the words therefore as "*nomen collectivum*," and intending to convey the whole interest in the direction of Clarence Jamison and his heirs. If this be so, then the estate in fee limited to the general heirs of the ancester (Clarence Jamison) by the operation of the rule (Shelly's case), becomes in him a fee simple, or fee tail,—in *1 Powell Dev.*, 334, "It is immaterial whether 'the heirs' are described under that or any other denomination, as 'issues' or 'son,' which cases create an estate tail in the first taker.

Doe Dem., Jones v. Davis, 4 Barn. & Ad., 43; *Mellish v. Mellish*, 2 Barn. & Cres., 520.

If this be true, therefore, that the testator uses the words "child, etc.," as the denomination of a class, that class being the descendants of the ancestor, then the words should be read as if they were "*heirs*,"—and to this effect is a very strong case in point, *M'Kee v. McKinley*, 9 Casey, 92. So in the present case the intention of the testator is that the estate should go in fee to those who could be the heirs of Clarence Jamison. The estate given is not distributive, *i. e.*, in shares, but generally to children and issue and their heirs; giving the whole estate to those who would take as heirs, and therefore indicating the intention of the testator that the heirs shall take. If this intention as to the second estate is plain, the fact that he *intended* a *life estate* to the ancestor, and no more, can make no difference. While he might have intended a

life estate to the first taker, if he intended the second devise to be equivalent to a devise to the heirs of Clarence Jamison, there the rule applies,—the word "child" or "children" becoming words of limitation.

Steacy v. Rice, 3 Casey, 75 (cited in 9 Casey, 92.)

In this connection the word *issue* as used is still further indicative that the testator was merely pointing out the line of transmission, and not indicating the persons with particularity. He was expressing his intention that the heirs of the first taker should take the fee. Therefore, although his intention might have been plain that Clarence Jamison should have only an interest for his life, if his intention was also that the children and their issue generally of Clarence Jamison—using those words as *descriptive of his heirs*—should take the remaining fee, then, by the rule in Shelly's case, Clarence Jamison takes a fee simple or fee tail. The devise over to the other sons has no effect, for the evident intention of the testator was that the heirs of Clarence Jamison should take, and if that is so, the devise falls under the preceding principle.

The intention of the testator can be gathered from the first devise to Albert Jamison, where in express terms he says, "if he should die without issue," showing that he uses the word "children" as general heirs.

As to the last point, namely, the sale under the mortgage given by direction of the Chancellor. At the time that mortgage was given, the legal estate was in the trustee, the youngest son not having arrived at the age of twenty-one years. If the mortgage was properly given under the order of the Chancellor, then the condition under which the estate was to go out of the trustee never arose.

In *Perry on Trusts*, 717, it is laid down, that while trustees cannot sell trust proper, yet courts of equity, upon cause shown, may decree a sale; and if a sale, a mortgage, which is a *conditional sale*. *Perry on Trusts*, 719. It is true that the devise is to the guardian, to expend the rents and profits for maintenance of the minors. These rents and profits were to come through the hands of the trustee, and the trustee, by his petition to the Chancellor, represented that those funds were not sufficient for the purpose designated. While therefore the trustee could not, considering the devise of the rents and profits for a specific purpose to be to him,

sell the property, yet the authority of the Chancellor was properly exercised, and the limitation in the order of the court to pay the mortgage out of the rents and profits in three years was directory only to the trustee, and cannot affect the security of the mortgage; for if he did not, which he did not, the mortgagee alone could look to the premises mortgaged as security for his debt. It was for the purpose of carrying out the provisions of the will that the order of the Chancellor was made.

The plaintiff therefore insists that he can give a good fee simple title to the lands and premises mentioned in the said agreement,

1st, Under the sale on the mortgage ordered by the Chancellor;

2d, Under the construction of the will of Thomas Jamison.

Alexander B. Cooper, for defendant:

What estate has Clarence Jamison *under the will of his father* in the farm known as the "Capelle Farm," a part of which he has agreed to sell? or presuming he had no legal estate, under the will.

What title (if any) did he obtain to the farm by virtue of his being the purchaser at the sheriff's sale, upon the mortgage?

I admit,

1st, That the trustee under the first provision of the will took the legal estate,—subject of course to the trusts imposed upon him, and to be determined when they were executed or performed; but that the *active* purposes of the trust ended "at the majority of the testator's youngest son, who lived to attain the age of twenty-one," and at that time the legal estate was transferred to the "*cestui que trust.*"

When real estate is devised to trustees, although with words of inheritance, *prima facie*, the trustees only take so much of the legal estate as the active purposes of the trust require.

Hawkins on Wills, 143, and *cases cited.*

This being true, what is the legal force and effect of the subsequent trust in the will?—"in trust, to permit and suffer my son Clarence to use, occupy, and rent, and to receive the rents, issues, and profits of the said 'Capelle farm' during the term of his natural life, for his proper use and benefit, and in case of the death of the said Clarence leaving a child or children, or the issue of such, remainder to such (child) or children."

I also admit that, under this provision, Clarence took the legal estate; for although a devise of real estate to a trustee, in trust to *pay* the rents and profits to A, vests the legal estate in the trustee, yet when the devise to the trustee is a trust, to *permit* and *suffer* A to receive them vests ths legal estate in A.

Hawkins on Wills, 140, and cases cited; *2 Jarman on Wills*, 294, &c.

The language of the testator is even stronger than the principle of the law requires. He says not only "to permit and suffer" his son Clarence to receive rents, issues, and profits, but to use, occupy, and rent the *land itself.*

The principal question therefore is, What is the extent of Clarence's legal estate? Is it within the purview and operation of the rule in Shelly's case? that is, is the word "child" or "children" a word of purchase or limitation? Is it a starting of a new stock, or do they take through their ancestors by descent?

I respectfully submit that the interest of Clarence Jamison (the plaintiff) in the land in question, is a life estate *in terms*,—"for the term of his natural life," and that the rule in Shelly's case does not apply to the words "child" or "children" as used in the will. The word "child" or "children" is always presumed to be a word of purchase, and the onus or burden is on the objector (the defendant in this case) to show that the testator has used them in the sense of "*heirs*,"—that such was his intention, and the intention must be manifest and plain.

And the court will observe in this connection that the devise to the "children" is not *immediate*,—that is, to Clarence *and* his "children,"—for in that case, under the resolution in Wild's case he having no children *in esse* at the time of the devise, he would take an estate tail. But here it is by way of a remainder, *after an estate for life*, to the child or children who shall survive him,—or such as he shall leave at his death; making it an entirely different case, so that the fact that Clarence had no "children" at the time of the devise, can and does not affect the case in the least; the rule of law being that when words of purchase are used, such as a devise to "*A and his children*" the children must be *in esse*, at the time of the devise, so as to take immediately, jointly, concurrently with the parent. If they are not *in esse*, of course they

cannot so take, and in such case the word "children," to have any meaning, must be construed as "*heirs.*" But where they take in remainder, after a life estate, it is only necessary for them to be in existence when the particular estate determines, for they do not take until then.

Wild's Case, 3 Coke Report (part 6, 16 b.) 288; *Guthrie's Appeal*, 37 Penna. St., 9; *2 Powell on Devises*, 299, 495; *Clew's Appeal*, 37 Penna. St., 23.

When an express limitation to a particular class of issue by an appropriate term of designation, as "children," "sons," "daughters," etc., is followed by the words "in default of issue," or *similar* words introducing an ulterior devise, these words are referable to the objects of that limitation, and do not enlarge the preceding gift.

Hayes on Dispositions of R. E., 32, 107 (7 Law Library, 16 and 58); *Hawkins on Wills*, 191–255.

The only remaining question is as to the title conferred (if any) by the sale under the mortgage given by the trustee in pursuance of the order of the Chancellor.

It is conceded that the will gives no authority to the trustee to make such a mortgage.

Also, that the order of the Chancellor confers no such power, but restricts the trustee to the rents and profits as security for the sum borrowed.

The trustee exceeded his authority, and therefore no title could be given by the sheriff's deed.

The plaintiff's title is derived *solely* from the will of his father, which I submit is only an estate for life, with the remainder to his children in tail.

COMEGYS, C. J.:

The questions submitted by the foregoing case, are, in effect—

1st. What estate did Clarence Jamison take under the will of his father, the testator?

2d. Was the mortgage made, of the "Capelle Farm," by virtue of lawful authority?

There are two conclusions which may be drawn from the language employed by the testator in settling his estate. That language

—or rather so much of it as concerns the question of title is in these words—bringing the several expressions together:

"I give, devise and bequeath unto my said executor and the guardian hereinafter named and appointed for my minor children all my estate, real and personal, not herein otherwise disposed of, to have and to hold the same unto them, or the survivor of them, the survivor's heirs and assigns. In trust nevertheless for the uses, intents and purposes hereinafter set forth and declared." * * * "To have and to hold the farm known as the 'Capelle Farm,' containing about two hundred and twelve acres, situated in Red Lion hundred, and the farm known as the 'Homestead Farm,' containing about two hundred and thirty acres, situated in St. Georges hundred aforesaid. In trust to rent the same to good and careful tenants at the best cash on share rents attainable as in their judgments shall be most advantageous, and to collect, expend and invest the same as hereinafter provided until the majority of my youngest son who shall live to attain the age of twenty-one years, then to raise out of or charge upon the said farms respectively such sum or sums as shall be necessary to make equal the shares of my sons Edgar, Clarence and Oliver, as hereinafter provided, and subject to such charge and condition. To permit and suffer my son Clarence to use, occupy and rent, and to receive the rents, issues and profits of the said 'Capelle Farm' during the term of his natural life for his proper use and benefit, and in case of the death of the said Clarence leaving a child or children, or the issue of such, remainder to such child or children or the issue of such, their heirs and assigns free and discharged from the aforesaid trust."

"In case of the death of any of my said sons Edgar, Clarence and Oliver, without leaving any child or children or the issue of such, the share of the one so dying shall go (to) the survivors, or survivor and the issue of such as may be deceased subject to the same conditions and limitations as their own shares respectively hereinbefore designated."

It was the obvious purpose of the testator to keep the lands in the hands of his trustees during the life of his sons respectively; but he was not aware of the rule of law that a trust estate cannot be supported where no active duty is to be performed by the trustee, and the whole management of the property is in the hands of

the *cestui que trust*. When, therefore, the testator provided, as he did, with respect to the "Capelle Farm" and the "Homestead Farm," he in effect gave his sons respectively legal estates in them.

We are then to consider the devise, with respect to the "Capelle Farm" as a disposition of a legal estate: the question is what legal estate? The plaintiff contends that the devise to him is of an estate of inheritance in fee-simple, or fee-tail which can be turned into a fee; the defendant that a life estate only is given him. They both cite authorities in support of their respective contentions. The testator's sons were unmarried and without issue at his death.

It may be considered settled law that where lands are devised to a person *and* his children, it is to them equally as tenants in common where there are any living at the date of the will; but that where there are none at that time, the words are held to be those of limitation, and the same as *heirs of the body or issue*. There could not well be a different construction. Adopting the reasoning of *Wild's case*, 6 Coke, 17, the children cannot take as immediate devisees, not being in *rerum natura*; nor in remainder, for the devise is immediate. But this is not a will of that kind, and Wild's case does not govern it. Here the testator devises to Clarence, his son, a legal estate, for life expressly, and in case of his death leaving a child or children or the issue of such *remainder* to such child or children or the issue of such, their heirs and assigns, etc., and in case of his death without leaving child or children or the issue of such, his share shall go to Oliver and Edgar, or the survivor of them, and the issue of such one of them as may be then dead leaving issue, subject, ect. This is the effect of the language used by the testator.

The rule in Shelly's case has no application to the devise to to the testator's sons. Neither in the construction of a deed or will, where the words "child" or "children" are used, and not *heirs* or *heirs of the body*, has the rule any place. *3 Greenleaf Cruise*, Tit. 38, Chap. 14, Sec. 39; Tit. 32, Chap. 23, Sec. 28. There is, therefore, no embarassment of decision on account of that rule.

It seems impossible to distinguish this case, in principle, from that of *Loddington v. Kime*, 3 Lev., 431; 1 Salk., 224; 1 Ld. Raym., 203. There the devise was to A for life without impeach-

ment of waste, and in case he should have any issue male to such issue male and his heirs forever, and if A died without issue male, etc., A was held to be tenant for life, with a contingent remainder to his issue in fee, and a concurrent contingent remainder to the ulterior devisee. See *Hayes on Estates Tail* (7 Law Lib.), 29 and 30, and Table IV. And in Wild's case it is said to have been resolved (the reference is to Moor, 220) "that if a man, as in the case at bar, devises land to husband and wife and after their decease to their children, in this case although they have not any child at the time, yet every child which they shall have after, may take by way of remainder according to the rule of law." The reason given is "for his intent appears that their children should not take immediately but after the decease of Rowland (the husband) and wife."

Further. Where there is a limitation to children in remainder as a class, it will vest in them as they come *in esse*, and will open and let in each successive member of the class until the determination of the particular estate. *Doe v. Penrhyn*, 3 T. R., 484, cited in 3d Greenl. Cruise, 213, note 1. In this case there is a limitation to the child or children of Clarence, who had none at the time. It is to them as a class, and to the issue of such of them as should be dead, at the time of his death, leaving issue. This shows that they were to take together, and not in succession one after the other, and precludes the idea of an estate tail. It would add nothing to the import of the language used, to have provided that they should take as tenants in common. And, then, the children and grand children were to take in *remainder;* which they could not do if Clarence had an estate tail. Issue in tail do not take in *remainder*, but by descent *per formam doni.*

From these authorities it seems clear that Clarence Jamison took only an estate for life under his father's will in the Capelle Farm.

With respect to the question of title acquired by Clarence Jamison under the sale by the sheriff in execution of the mortgage made by the Trustee under the order of the Court of Chancery of New Castle county—there does not appear to be in the will of the testator any authority to make a mortgage of the premises to raise money for the maintenance and education of the testator's sons; nor was there any, as it appears to me, in the said Court to make

such order. The whole proceedings for sale of the Capelle Farm, therefore, appear to have been without authority.

HOUSTON, J., dissenting: The counsel in the case concur in the opinion that under the provisions of the will the legal estate of the trustees in the lands devised to them continued only so long as the purposes of the trust required it, but when the active purposes of it had been served, the legal estate of the trustees in them ceased and became vested in the *cestui que trust*, and which occurred in the devise of the particular premises in question, a part of the "Capelle Farm," in trust to permit and suffer his son Clarence to use, occupy and rent, and to receive the rents, issues and profits of the said Capelle Farm during the term of his natural life, for his proper use and benefit, and in case of the death of the said Clarence leaving a child or children or the issue of such, to them, their heirs and assigns free and discharged from the aforesaid trust," when Oliver, his youngest son, attained the age of twenty-one years, and which the counsel also admit occurred in the year 1878. But they differ as to the testamentary construction to be given by us to the concluding terms of it, "and in case of the death of the said Clarence leaving a child or children or the issue of such, to them their heirs and assigns free and discharged from the aforesaid trust," whether they are to be construed as words of limitation in analogy to the rule in Shelly's case, or as words of purchase in this devise? The counsel for the defendant contends for the former, the counsel for the plaintiff for the latter interpretation. For they agree that when the youngest son attained the age of twenty-one years, the duties of the trustees ceased, and the legal estate in the Capelle Farm vested in the *cestui que trust* of it under the devise, Clarence Jamison, for the term of his life, subject to the limitation over of it on his death leaving a child or children or the issue of such, to them their heirs and assigns, as directed in the words of the devise, and the meaning and construction of which presents for our consideration the first question to be determined between them in the case. For the plaintiff it is contended they constituted a devise of the "Capelle Farm" to the son of the testator, Clarence Jamison, in fee tail, and for the defendant that they constitute a devise of it

to him for the term of his life only, and at his death leaving a child or children, or the issue of such remainder to them.

Before I proceed, however, to express any opinion upon this question, I think it proper to recur to and repeat the whole of the item in which this devise occurs in the will as set forth in the case stated since all of the terms and clauses of it must be considered and construed together in order to determine the correct meaning and interpretation of it, and which are not fully presented in the briefs of counsel. It is as follows: "I give and devise unto my executor and the guardian hereinafter named and appointed for my minor children all my estate, real and personal, not herein otherwise disposed of, to have and to hold the same unto them or the survivor or survivors of them, *in trust* nevertheless for the uses, intents and purposes hereinafter set forth and declared. To have and to hold the farm known as the "Capelle Farm," containing about two hundred and twelve acres, situated in Red Lion hundred, and the farm known as the "Homestead Farm," containing two hundred and thirty acres, situated in St. Georges hundred aforesaid. In trust to rent the same to good and careful tenants at the best cash or share rents attainable as in their judgment shall be most advantageous, and to collect, expend and invest the same as hereinafter provided, until the majority of my youngest son who shall live to attain the age of twenty-one years, then to raise out of, or to charge upon the said farms respectively such sum or sums as shall be necessary to make equal the shares of my sons Edgar, Clarence and Oliver, as hereinafter provided and subject to such charge and condition.

To permit and suffer my son Clarence to use, occupy and rent and receive the rents, issues and profits of the said "Capelle Farm" during the term of his natural life for his proper use and benefit, and in case of the death of the said Clarence leaving a child or children or the issue of such, their heirs and assigns free and discharged from the aforesaid trust.

To permit and suffer my son Oliver to use, occupy and rent and receive the rents, issues and profits of the said "Homestead Farm" during the term of his natural life, for his proper use and benefit, and in case of the death of said Oliver leaving a child or children or the issue of such, their heirs and assigns free and discharged from the aforesaid trust.

To invest all the rest and residue of my estate not herein otherwise disposed of in bonds and mortgages as aforesaid, interest payable semi-annually, and keep the same so invested until the majority of my youngest son who shall attain the age of twenty-one years, whereupon I desire my Trustees aforesaid to have the the said "Capelle Farm" and the said "Homestead Farm" valued at their just and true value in money by three substantial men in the neighborhood, and that to such valuation the trustees shall add the four thousand dollars and all interest accrued thereon which hereinbefore is charged upon the "Jamison Corner Farm," and all the rest and residue of my estate invested as first directed in this item, and also any other legacies or devises to which my said sons Edgar, Clarence and Oliver may become entitled, and the aggregate sum thus ascertained to apportion in equal shares among my sons Edgar, Clarence and Oliver, and their issue, the issue in all cases taking their parent's share. In the said apportionment my said son Clarence to take the said "Capelle Farm" with such incumbrance or addition as may be necessary to equalize the shares of the said Edgar, Clarence and Oliver, and the said Oliver to take the "Homestead Farm" with such like incumbrance or addition; but the share of the said Edgar shall be in money, invested in good bonds and mortgages as aforesaid, the interest payable to him after such apportionment semi-annually, during his natural life, and from and immediately after his death the principal and all interest accrued thereon payable to his child or children or the issue of such.

The rents and profits arising from the Capelle and Homestead farms, and the interest of all sums invested as in this item prescribed, and so much thereof as shall be necessary, shall be expended by the said guardian in the maintenance and education of any said sons Edgar, Clarence and Oliver, and the residue, if any, invested for their benefit, first deducting yearly a sum not exceeding one hundred and fifty dollars to be expended on each of said farms to keep the same productive and in good condition.

In case of the death of any of my said sons Edgar, Clarence and Oliver without leaving any child or children, or the issue of such, the share of the one so dying shall go to the survivors or survivor, and the issue of such as may be deceased subject to the same

conditions and limitations as their own shares respectively hereinbefore designated."

It is admitted that the youngest son of the testator attained the age of twenty-one years in the year 1878, and that the purpose and limitation of the trust then expired, and that his son, Clarence Jamison, then become seized of the legal estate in the "Capelle Farm" for the term of his life free and discharged from the trust, but it is denied that he took any larger estate or interest in it under the limitations over it in case of his death, leaving a child or children, or the issue of such, as directed in the devise, and the whole item of the will above referred to, whilst it is contended on the part of the plaintiff and the authorities cited by his counsel, that as it is a gift of the farm by will, the rule in Shelley's case applies to it, the words "*children*" employed in the devise over at his death, should be construed to be words of limitation, and not of purchase, and that he consequently took under the devise, either an estate in fee simple or in fee tail in the farm. And there is no doubt that such words so employed in devises have been so construed in many cases more than he has cited, although the general rule of testamentary construction is admitted by him to be to the contrary, that is to say, that ordinarily the word "children" in a will is used as a word of purchase and not of limitation.

But with regard to the class of cases which constitute an exception to that general rule, and to which I have just alluded, Mr. Jarman remarks that it should be observed, however, that in a considerable class of cases the word child or children has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring, and been considered to have been employed as *nomen collectivum*, or as synonymous with *issue* or descendants; in which general sense it has often the effect, when applied to real estate, of creating an estate tail. Where this construction has prevailed, however, it has generally been aided by the context. There it was synonomous with issue in all events. *2 Jarm. on Wills*, 73. And where the intention of the testator clearly appeared to have used the term as equivalent to the word issue or descendants, and the devisee for life had no child or children when the will was made, or at the time of the death of the

testator, and it therefore could not apply as a *descriptio personarum*, such a construction was given to it, as a word of limitation and not of purchase. *1 Pow. on Dev.*, 334. And accordingly it was held in such cases that the parent and devisee for life took an estate tail in the land devised. *Broadhurst v. Morris, 2 Barn. Adolp. 1; Byfield's Case*, cited by *Hale, C. J.*, in *King v. Snelling, 1 Vent.*, 231; *Robinson v. Robinson, 1 Burr.*, 38; *Seward v. Willock*, 5 East., 198; *Raggett v. Beatty*, 2 Moo. & Pay., 512; *Doed. Simpson v. Simpson*, 5 Scott, 770.

I consider that this construction of the words—"dying without leaving child or children or the issue of such" as a word of limitation, and clearly importing an intention on the part of the testator to use them as synonomous with the words issue or descendants, is also aided by the context of the devise, and the repetition of the same identical words in each of the devises in it to his three sons respectively, and particularly, by the terms employed by the testator in his final disposition and limitation over of the whole subject matter of the devise in the last clause of the item, which are as follows: "In case of the death of any of my said sons Edgar, Clarence and Oliver without leaving any child or children, or the issue of such, the share of the one so dying shall go to the survivors or survivor, and the issue of such as may be deceased subject to the same conditions and limitations as their own shares respectively hereinbefore designated." And although the will seems to have been written with much care and deliberation in the dispositions and limitations of it, it is only by implication that any child or children of either of them, or the issue of such, who may be living at his or her or their father's death, can take any share, or interest in the several estates so devised to them, according to the literal import of the terms of the will, unless we interpret the words in question to be words of limitation, and to confer such by construction an estate tail in the "Capelle Farm" on the said son, Clarence Jamison, and an estate tail in the Homestead Farm on the said son, Oliver Jamison. And yet, it seems to me that no one can read this will and observe the manifest desire and solicitude of the testator reflected in it, to limit the two farms to the two sons named respectively for the terms of their natural lives, with remainder at their death to the issue of

each of them, if they should leave any, without coming to the conclusion that it must have constituted the main and paramount purpose in the mind of the testator for making the two devises in particular as we find them in the item in question. I am therefore of the opinion that the testator intended by the use of the words in the devise in question of the "Capelle Farm" to his son, Clarence Jamison, for the term of his natural life, and in case of the death of the said Clarence, leaving a child or children or the issue of such remainder to such child or children or the issue of such, their heirs and assigns, according to the rule of testamentary construction applicable in such a case as this, a general failure of issue at his death, and that under the devise he took an estate tail in the said farm, as it may now be considered well settled that the word issue or its equivalent term according to the clear intention of the testator, is employed in a devise of real estate to a person for life, remainder to his issue at his death, is *nomen collectivum*, a word of limitation, and not of purchase, and synonomous with the words, *heirs of his body*, which are of all words the most appropriate in legal phraseology to confer an estate tail general on the first taker of the land under the devise. *2 Jarm. on Wills*, 328, 329.

But it appears that the provisions made by the testator in this item of his will for the maintenance and education of his sons Edgar, Clarence and Oliver until the majority of the youngest son who should live to attain the age of twenty-one years, out of the rents and profits of the Capelle Farm and Homestead Farm, and the interest of all sums invested by his trustees as prescribed in this item, proved inadequate for the purpose, and the executor who was also one of the trustees under the will preferred his petition to the Chancellor representing that by the will of the testator all his real estate was held by the petitioner in trust for his three minor sons, Edgar, Clarence and Oliver Jamison, consisting of three farms in New Castle county, and that the gross annual rents and profits of them amounted to about three thousand dollars, subject to the payment of taxes, repairs and improvements provided for by the will, but that the net rents did not then amount to a sufficient sum to comfortably board, clothe and educate the said minors, and that their guardian was in arrears and then indebted on their account to the amount of eight hundred dollars or more, and that if he could

be authorized to borrow as trustee under the will a sum not exceeding twelve hundred dollars for a few years, he thought he would then be able to pay the sum out of the increased rents of the estate, and that sum would relieve the condition of the guardian and enable him to pay up the amount of indebtedness against the said minors. He therefore prayed the Chancellor to allow him to borrow upon the best terms he could the sum of twelve hundred dollars as trustee, or in his own name for the use of said trust estate with which to pay the liabilities then standing against said minors for past maintenance.

And thereupon the Chancellor made an order that he be authorized and empowered to borrow on account of the trust estate the sum of twelve hundred dollars for three years, to be reimbursed by the rents and profits of the trust estate, and that the sum, or so much thereof as should be necessary, should be applied to the payment of debts then accrued and unpaid for the support, maintenance and education of Edgar, Clarence and Oliver Jamison, the three minor children of Thomas Jamison, deceased, to be expended by their guardian, John P. Belville, who shall give receipts to the trustee for the same, and be chargeable with it as for other moneys received on account of said minor children.

The order was made on the 20th day of February, 1874, and on the 10th day of April following the executor and trustee borrowed the sum of twelve hundred dollars from Bentley Worth for that purpose, and as such, made, executed and delivered his bond and mortgage to him for that sum, to be paid in three years from that date, the lands embraced and described in the mortgage consisting *inter alia* of the said "Capelle Farm;" and the loan not having been paid at maturity, nor as late as six years after the date thereof, the mortgagee proceeded and obtained judgment on the mortgage, and at the November term, 1880, of the Superior Court in and for said county, the said farm was sold under a writ of *levari facias* thereon by the sheriff of the county and was bought at the sale by the said Clarence Jamison (the youngest of the said sons of the testator having in the meantime attained the age of twenty-one years), and who since the sale and conveyance of it by the sheriff to him had entered into an agreement with the defendant, Leontine J. McWhorter, to sell and convey to him the portion

of it designated and described in the agreement, and which agreement he refuses to comply with on the ground alleged by him of insufficiency of title in the plaintiff to the premises as set forth in the case stated.

In the view which I have taken of the question already considered and disposed of by me, it is not for me to enter into the consideration of the remaining question as to the title conferred on the purchaser by the sale under the mortgage given by the trustee pursuant to the order of the Chancellor, but if it were necessrry for me to consider and decide that should be obliged to hold under the facts and circumstances of this case that the mortgagee had a legal right to execute and sell on the mortgage at any time after the failure of the trustee for three years to pay it, and being seized as such of the legal estate in the premises when he so mortgaged them by the authority of the Chancellor, the purchaser took the legal title to them at the sheriff's sale upon it. The case falls within the reason and policy of the doctrine that a trust to raise money out of the profits of land will include a power to sell or mortgage; and such a construction of the power has long been an established principle in the Courts of Equity. *4 Kent's Com.*, 148.

SUPERIOR COURT,

SEPTEMBER TERM,

1885.

FLINN & JACKSON *v.* EDWARD C. FENNIMORE.

Sheriff's Return on fi. fa.—Levy—Inventory and Appraisement.

In New Castle County a sheriff's return of a *fieri facias* was "levied on goods and chattels as per inventory and appraisement annexed." The inventory and appraisement was made by the sheriff alone and had a memorandum at the foot thereof by the defendant in the writ acknowledging the same to be a true list and appraisement of his property. It appeared that such an inventory and appraisement of the property and return of the writ had long been the practice in said county. The *levy held* sufficient and binding.

(*New Castle, September 22, 1885.*)

PETITION for application of proceeds of sheriff's sale.

It has long been the practice in all the counties of this State for the sheriff to levy writs of *fieri facias* on the goods and chattels of the defendants in them soon after they come to hand, by endorsing on the writ the words levied on the goods and chattels, and annexing to it an inventory and appraisement of them, prepared or adopted by the sheriff himself, and when there is no actual seizure of the goods by him under the writ, this constitutes the levy of it on them.

The return of the *fi. fa.* was "levied on goods and chattels as per inventory and appraisement annexed" by the sheriff, and at the foot of the inventory there was an endorsement by the defendant in the *fi. fa.* acknowledging the same to be a true list and appraisement of his goods. A subsequent *fi. fa.* was issued on the

judgment of another against the defendant, and levied on the same goods and chattels, and also on some additional goods not included in the first levy. A *venditioni exponas* was afterwards issued on the first levy, and the goods were sold at the same time upon it and on the second *fi. fa.*, and the counsel for the latter claiming the proceeds of the sale to be applicable to it, the sheriff had brought the money into court for distribution.

Davis for the subsequent *fi. fa.* creditors. The inventory and appraisement made in the levy of a *fi. fa.* on goods and chattels must be by two judicious persons under oath or affirmation when they remain unsold on the return day of the writ. Rev. Code, 685, Sec. 47; *Hargadine v. Ford*, 5 Houst., 393. And that is the inventory and the appraisement that is the levy. *Sipple v. Scotten*, 1 Harr., 107. Constructive possession must be open and in public view. *Lowery v. Coulter*, 9 Pa., 399; *Duncan's Appeal*, 37 Pa., 500; *Minor v. Smith, et al.*, 13 Ohio, 79. In the first levy the appraisement of the goods, except what was made by the sheriff, was made by the defendant in the *fi. fa.* An agreement, however, between a debtor and sheriff binds the former, but not subsequent execution creditors. *Duncan's Appeal*, 37 Pa., 501, 502; *Lowery v. Coulter*, 9 Pa., 352.

Austin Harrington for the first execution creditor. The first *fi. fa.* in this case was issued September 30th, 1884, and was returned at the following term of the court "levied on goods and chattels, as per inventory and appraisement annexed," by the sheriff without the intervention of any actual appraisers, and in lieu of the certificate of such appraisers; and there was an endorsement by the defendant in the *fi. fa.* at the foot of the inventory acknowledging the same to be a true list and appraisement of his goods, and thereupon a *venditioni exponas*, No. 113, May Term, 1885, was issued, and under it and sundry other writs including that for which the counsel for the petitioner appear, a sale of the goods so levied on, was afterwards made by the present sheriff, and the proceeds of it were paid into court by him on his petition, a subsequent execution creditor claiming the same as legally applicable to his levy; and the question is, was the levy in this case defective and

insufficient under the circumstances, and the practice recognized in this court, for the want of an appraisement by actual and sworn appraisers of the goods?

What was a levy of an execution at common law, and what is it to be considered here in the absence of any mode whatever prescribed by statute for the making of an inventory and appraisement of goods and chattels in the levy of a *fi. fa.* on them by the sheriff? The only provision of the statute in regard to it being as follows: "Where the levy, or seizure, by virtue of a *fieri facias* shall have been of goods and chattels unsold at the return day, the sheriff shall annex to the writ an inventory of each article of such goods and chattels, with an appraisement of the same, duly made and certified, so that their value may be judged of." Rev. Code, 685, Sec. 47. And simple as it is, such it substantially has been since it was enacted in 1788. A levy of execution is the taking of possession under it of the property of a person condemned by judgment to pay a certain debt, and that was originally done by an actual seizure of the defendants goods by the sheriff, or by leaving them in the safe keeping of his bailiff. But that practice was changed, or was probably never adopted here; on the contrary, the levy became constructive generally in our practice by the sheriff's leaving the goods with the defendant, and designating by an inventory of them what goods the execution had been levied on, or constructively seized by him under it, and then returning it with the writ; but the inventory was unnecessary where there was an actual seizure of the goods followed by a sale of them under the *fi. fa. Snell on Sheriff*, 194, 4 Com. Dig. Execution, C. 5; *Watts v. Cleveland*, 3 E. D. Smith (N. Y.), 553. The levy being nothing more than the seizure of the goods by the sheriff under the execution, these requisites must be measured by what is necessarily incident to the designation of the goods seized. Hence it was that the practice grew up to return an inventory of the goods seized or levied on. *2 Paine and Duer's Practice*, 334. The inventory is not the levy; it is merely the evidence of what goods are included in the levy.

Following the practice of making the inventory, the sheriff being responsible for the goods levied, it was entirely proper that they should be appraised. But by a failure to have them appraised in any special form or manner, no one could be damnified except

first, the sheriff, who in case of liability for the loss of the goods would be thereby protected upon the question as to the value of them; secondly, the defendant in the writ, who thereby has the value ascertained of the goods taken from him under it; and thirdly, the execution creditor and plaintiff in the writ in case he should wish to sue the sheriff for his failure to sell the goods, and to have the value of them thereby ascertained before their loss. None of these parties, however, are objecting to the sufficiency of the levy involved in this case. A subsequent execution creditor has no interest in the appraisement of the goods levied under a prior *fi. fa.* at the suit of another judgment creditor, for he can have the same goods levied and appraised under his *fi. fa.* and may force a sale under it subject to the prior levy as to any and all of the goods embraced in both of the levys. The goods and chattels of the defendant, Fennimore, were bound by the *fi. fa.* of the plaintiffs, Flinn and Jackson, from the moment it came to the hands of the sheriff, as it was levied on the goods in question within sixty days thereafter by him. In making the levy he was not bound to take the goods into his actual possession, but his levy of the execution on them was evidenced by the inventory made by him at that time, and gave him the constructive possession of them from that time. The leaving of them in the hands of the defendant made him, therefore, the bailee of the sheriff, and responsible to him for the forthcoming of them. *Weatherby v. Covington*, 49 Amer. Dec., 623; *Butler v. Maynard & Peck*, 11 Wend., 548. And the levy was accordingly complete before the proceeding of making the inventory and appraisement could of course be carried out.

The provision of the statute already given contemplates this, and it has been decided in our courts that the levy is made by the constructive seizure of the goods evidenced by the inventory of the sheriff; for in the case of *Hargadine v. Ford*, 5 Houst., 380, the court said; "We are of opinion, and say to you (the jury) that the sheriff's certificate and inventory purporting to have been made on the ninth day of July, 1872, constituted such seizure and levy." But in that case the appraisement of the goods inventoried by the sworn appraisers was not made until the 31st day of August following. The concluding language of the charge to the jury in that

case, does not qualify that opinion or the definition of a levy before given in it, but merely gives a reason for this directory provision of the statute prescribing a duty to be performed by the sheriff, not as part of the act of making a levy, or in making a levy, but to be performed by him afterwards, and after the levy had been made, or the goods had been levied on by him, and then only when they remain unsold by him up to the return day of the execution at the ensuing term of the court. The provision itself, therefore, necessarily imports that the sheriff must have made a levy on the goods before this further official act and duty with regard to them in such a case is to be performed by him. And a valid and sufficient levy having thus been made by the late sheriff under the *fi. fa.* of the plaintiffs on the goods and chattels of the defendant in time to complete and establish the lien of it upon them from the time it came to his hands, no subsequent neglect of official duty or irregularity on his part with respect to it on the return of the writ and the levy to the court, can legally invalidate it. Nor could he, either by design or neglect, legally undo what he had before legally done in such a case. *3 Ch. Genl. Pr.*, 524.

But statutory provisions of this character have been held by courts of law in this, as well as other states, to be directory merely, and not mandatory, and we have in this State an early case of this kind in point in which it was so held in the old Court of Common Pleas in Kent county, at the May Term, 1815, furnished by the reporter in a foot note to the case of *Pyle v. McMonagle*, 2 Harr. 468, as that of *Thomas W. Rogers v. James Lofland*, with reference to another provision of a similar character in the same early statutes from which this is substantially copied, as he had before remarked, in which it was further provided, among other things, that where the levy of a *fi. fa.* should be returned as made subject to prior executions, the sheriff should in his return set forth, as well the names of the plaintiffs, in such prior executions as should have come to his hands, as the sums thereby to be levied, *2 Del. Laws*, 927; and in relation to which it was held by the court that it would support the return of a sheriff of a levy made subject to prior executions, although such return did not pursue that provision of the statute, in setting forth the names of the parties in such prior executions, and the sums thereby to be levied; because, as

Booth, Chief Justice, added in announcing the opinion, the sheriff's have never in any of the counties attended to these provisions, and the setting aside resurns made conformable to a practice of twenty-seven years standing, would produce the most terrible consequences.

The goods of the defendants in the execution became bound by it from the moment it went into the hands of the sheriff, and as soon as it was levied on them they were in his constructive possession without a seizure of them, or any inventory or appraisement had been made of them by him, for the inventory was not the levy on the goods mentioned in it, but only the evidence of it. The levy was therefore complete before the formality of the inventory and appraisement could be carried out.

But suppose for the sake of argument that the construction of the statute should be as contended for on the other side, may not the plaintiff in the execution waive the appraisement of the goods levied on by sworn appraisers, and accept the appraisement of them by the defendant in the execution, or consent that the sheriff may accept from him both his inventory and appraisement of the goods? Both by the established practice in this State, and on general authority elsewhere, undoubtedly he may. If it is done, no subsequent execution creditor without also consenting to it, can be bound by it, or concluded from levying on other goods of the defendant not included in such inventory and appraisement, as well as on all his goods included in it, nor could he be barred by it of his action against the sheriff for any loss sustained by reason of his failure to levy on all the goods of the defendant legally subject to his execution, and consequently no other person can be injured by it in such a case even, than the execution creditor or any other creditor consenting to it. *Caldwell's Admrs. et al. v. Fifield & Mathews*, 4 Lab., 150; *Dean v. Thatcher*, 3 Broom, 470.

From an examination of the records of this court for a long period of time in relation to the practice in this county, it appears that in a large majority of the levies of writs of *fieri facias* on goods and chattels, the inventory and appraisement of the goods levied on is furnished the sheriff by the defendant in the execution, and in precisely the same form in which they were furnished to the sheriff in this case. Such a practice has grown up and been recognized by our courts, and to subvert or unsettle it at this late day

might seriously affect all land titles acquired under sheriff sales, the validity of which depend on the legality of a prior sale under a *fi. fa.* of the defendant's personal estate.

When there is an actual seizure of the goods, or a taking of them into his actual custody and possession by the sheriff under the *fi. fa.* that constitutes the levy of it upon them, and the act itself constitutes the evidence of it without any inventory or appraisement of them, but as this is not generally done in our practice by Sheriff's in levying such executions on goods, but is only constructively done in contemplation of law by the sheriff's annexing to his writ at once, or soon after it comes to his hands, an inventory and appraisement of the goods and chattels of the defendant, prepared or procured by him at the time without the intervention of sworn appraisers until a later period in the proceeding, this inventory and appraisement becomes for the time being (the goods in the meanwhile usually continuing in the actual possession of the defendant) the best, if not the only evidence, of the goods and chattels thus levied on, as well as of the value of each article of them included in the inventory and appraisement, and in such case being the only means of ascertaining and specifying the goods and chattels so constructively seized and taken in execution under the writ by the sheriff, that such inventory and appraisement made by him in the inception of its execution, not only became the best evidence of, but was even early ruled by the court to constitute the levy itself of the *fi. fa.* on the goods, and that the lien of a levy under a *fi. fa.* is limited to the property ascertained by the inventory and appraisement. *Sipple v. Scotten*, 1 Harr., 107; *Farmers' Bank et. al. v. Massey*, 1 Harr., 186; *Hargadine v. Ford*, 5 Houst., 380.

The Court, on being informed that such had long been the practice of making levy of writs of *fi. fa.* on goods and chattels in this county, and of inventories and appraisements of them returned by sheriff, held the levy of the first *fi. fa.* in this case to be sufficient and binding, and directed the money arising from the sales of the goods and chattels on which it had been levied, should be first applied to the payment of it.

Comegys, C. J., dissenting.

THE STATE OF DELAWARE, ex-relatione, "THE BALTIMORE & OHIO TELEGRAPH COMPANY, of Baltimore City," a Corporation of the State of Maryland, *v.* THE DELAWARE & ATLANTIC TELEGRAPH AND TELEPHONE COMPANY.

Mandamus—Foreign Corporation.

A foreign corporation, by its charter limited in its operations to the State of its creation, is not entitled to the writ of mandamus against another foreign corporation.

The rights, privileges and immunities in the several States secured by the Federal Constitution to citizens of other States, does not apply to corporations.

(*New Castle, September, 1885.*)

MOTION to discharge a rule granted defendants to show cause why a writ of mandamus should not issue.

Edward G. Bradford, for the respondent, assigned the following reasons in support of his motion:

1. For that in and by the petition and exhibits filed by the said Baltimore & Ohio Telegraph Company of Baltimore City, the relator in this cause, it appears that the said relator is authorized by its charter to construct, own, operate and lease lines of telegraph only in the city of Baltimore and throughout the State of Maryland, and its authority to carry its operations is expressly limited to the city of Baltimore and the counties of the State of Maryland; and it does not appear that said relator possesses any authority under the laws of the State of Delaware to construct, own, operate or lease any telegraph line or lines within the State of Delaware, or to carry on any operations therein.

2. For that it appears in and by said petition and exhibits that the said relator is a foreign corporation created by and existing under the laws of the State of Maryland, and does not appear that it is a corporation created by or existing under the laws of the State of Delaware; and it appears that said respondent is also a foreign corporation created by and existing under the laws of the State of New York, and does not appear that it is a corporation created by or existing under the laws of the State of Delaware, or that this court possesses any jurisdiction to proceed by way of mandamus against said respondent.

The certificate of incorporation of the relator sets forth that

the corporators "hereby form a corporation for constructing, owning, operating and leasing lines of telegraph in the State of Maryland."

There is not a word in the certificate to indicate any intention or authority on the part of the corporation to construct, own, operate, or lease any telegraphic line beyond the limits of Maryland, or beyond those limits to carry on any operations, nor does the relator's petition anywhere assert such authority. On the contrary its statement is: "That it is a corporation duly incorporated under the laws of the State of Maryland, doing business at Wilmington, Delaware. The object and purpose for which it was incorporated is the owning, operating and leasing of telegraph lines in the city of Baltimore and throughout the State of Maryland." With such a charter and such only, so far as is disclosed by the petition, the relator comes within the State of Delaware, and asks this court to compel, by mandamus, the respondent to aid the relator in operating lines of telegraph beyond the limits of Maryland and within this State. The court will surely decline to do so, for the reason that the relator is wholly without authority to operate telegraphic lines in Delaware. The relator, as a corporation, is a mere creature of the law, and as such its powers are measured by its charter. What has not been granted in and by its charter or articles of association, either expressly or by implication, is prohibited by the common law. *Trustees of Dartmouth College v. Woodward*, 4 Wheaton, 518, 636; *Bank of Augusta v. Earle*, 13 Pet., 519, 587; *Perrine v. Chesapeake and Delaware Canal Co.*, 9 How., 172, 184; *Thomas v. R. R. Co.*, 101 U. S., 71,81; *R. R. Co. v. Harris*, 12 Wall., 65, 81; *Morawetz on Pri. Corp.*, Sec. 149, 150. The charter of the relator does not grant or attempt to grant either expressly or by implication, any right or authority to operate telegraph lines beyond the limits of Maryland.

The relator under its certificate of incorporation, became clothed with such powers, in addition to those expressly granted, as were required to carry into effect the express grant. Such powers only were conferred by implication. *Straus & Bro. v. Eagle Ins. Co. of Cincinnati*, 5 Ohio St., 60, 62.

No implied power was conferred, or intended to be conferred, to construct and operate lines of telegraph within the State of Dela-

wore. Such a power is not "necessary to carry into effect those expressly confered." It is not "incidental to the very existence" of the corporation. To recognize the existence of such a power would be practically to render indefinite and uncertain to the last degree the fundamental agreement between the corporators, upon which they should have the right to rely as a sure guaranty that "the object of this company shall be to prosecute the enterprise expressly set forth in their charter or articles of association," and that the company shall not "join in any speculation which is not in pursuance of the purposes thus indicated." The existence of any such power is expressly negatived by the provision in the charter of the relator, stating that "the places where the operations of the corporation are to be carried on, are the city of Baltimore and the counties of the State of Maryland." No State can grant a corporate franchise which *proprio vigore* can be operative or of binding force beyond the limits of such State. *Morawetz on Pri. Corp.*, Sec. 500. The recognitition by any State of the existence of a foreign corporation and of the legal validity of its acts and contracts in such States depends solely upon the comity of that State. *Paul v. Virginia*, 8 Wall., 168, 181. It is evident that the law of comity can never enlarge or add to the powers of the foreign corporation as contained in its charter, unless the charter of the company has undertaken to confer the authority to act within the foreign State, there is no power on the part of the company, the exercise of which can be recognized as valid under the law of comity. *Morawetz on Pri. Corp.*, Sec. 501, 502, 504, 506; *Angell & Ames on Corp.*, Sec. 161; *Bank of Augusta v. Earle*, 13 Pet., 519, 587, 588, 589; *Runyon v. Coster's lessee.*, 14 Pet., 122, 129, 130; 25 Mich., 214, 217, 220, 223, 227; *Pierce on Railroads*, 14, 497; *Binney's Opinion*, 4 Rob. (La.) 517, 72 Ill., 50, 53; 29 Barb. 650, 654, 655; *Lathrop v. Commercial Bank of Scioto*, 8 Dana (Ky.) I14, 115, 117; *Curtis v. McCullough*, 3 Nevada, 202, 218; *Bard v. Poole*, 12 N. Y., 495, 504, *Aspinwall et al. v. The Ohio & Miss. R. R. Co.*, 20 Ind., 492; *Merrick v. Van Sant Wood*, 34 N. Y. 208, 215, 221.

The relator possesses no implied power under its charter to extend its lines beyond the limits of Maryland, even though such extension would be a pecuniary benefit to or conducive to the convenience of the contract of the relator's business within Maryland.

Abbott v. Balt. & Rapp. Steam Pack. Co., 1 Md. Ch., 542, 549; *Ill. Cen. R. R. Co. v. Irwin*, 72 Ill., 452, 455; *Pearce v. Madison & Indianapolis R. R. Co. and Peru & Indianapolis R. R. Co.*, 21 Howard, 441; *The New Orleans, etc., Steam. Co. v. Dry Dock Co*, 26 Am. Rep., 90; 28 La. Ann., 173; *Balt. & Havannah Gress. Turnpike Co. v. Union Railway of Balt.*, 35 Md., 234; *O. & M. R. R. Co. v. I. & C. R. R. Co.*, 5 Am. L. Reg. N. S., 733; *Downing v. Mt. Wash. R. Co.*, 40 N. H., 230; *Pierce on Railroads*, 495; *Simpson & Denison*, 10 Hare, 51, 54, 57, 58, 60, 61; *East. A. R. Co. v. E. C. R. Co.*, 7 Eng. 2 and L. Eq., 505, 508; *Colman v. E. C. R. Co.*, 10 Beav., 1; *Salomons v. Laing*, 12 Beav., 339; *Munt v. The S. & C. R. R. Co.*, 3 Eng. L. & Eq., 144, 149; *Morarwetz on Pri. Corp.*, Sec. 209, 227, 221. Legitimate traffic arrangements are simply agreements by which the business that comes within the scope of several companies is carried on more conveniently and economically and can never involve an extension of the chartered enterprise beyond the limits of the charter.

It does not at all follow because a third person may maintain an action against a corporation on a contract, or act made or done under an extension of the business of the company, beyond the chartered limits, that such extension should be considered legal or authorized by law. Such extension is illegal although such third person may be permitted to recover. *Bissell v. The M. S. & N. Ind. R. R. Co.*, 22 N. Y., 258, 280, 281; *Parish v. Wheeler*, 22 N. Y., 494, 506, 507; *Feitel v. Middlesex R. R. Co.*, 109 Mass., 398. It is claimed, on behalf of the relator, that by virtue of an Act of the General Assembly of Maryland, approved May 3, 1882, the relator received authority to extend its lines through Delaware. Laws of Md., 1882, 358. But, under the petition as filed, the relator cannot take advantages of any Maryland statutes. The relator must set forth specifically all facts and circumstances necessary to entitle him to a writ of mandamus. *High on Ex. Leg. Rem.*, Sec. 10, 450. The motion to discharge the rule operates as a demurrer to the petition. Ibid, Sec. 455. The several States of the Union are foreign to each other. 1 Greenl. on Ev., Sec. 489. And courts will not judicially notice foreign laws. Ibid, Sec. 486. Hence, foreign laws must be pleaded as well as proved. *Kinney v. Hosea*, 3 Harr., 77; 1 Chitty on Pl., 216. The petition not hav-

ing set forth or referred to the Maryland Statutes is, therefore, fatally defective.

The Maryland statute undertakes to authorize an extension of telegraph lines into other States, only with the consent of the majority of the owners of the capital stock of the corporation given in general meeting. Hence, such consent at such meeting is a condition precedent to the right of the company to operate lines in Delaware and should upon elementary principles of pleading have been stated in the petition, especially in view of the fact that this case is an application to the State of Delaware through its courts to compel the respondent to aid the relator in carrying on business in Delaware. It is also claimed on behalf of the relator that by virtue of Sec. 5263 of the U. S. Rev. Statutes the relator has authority to operate lines telegraph in Delaware. But this position is clearly untenable. The purposes of the statutes is to prevent state interference with the freedom of action of different telegraph companies. *Pensacola Tel. Co. v. West., etc., Tel. Co.*, 96 U. S. 1. It was never intended to enlarge the powers of foreign corporations in such sense as to permit them to do business in other States when their charters prohibit it.

The relator being without authority, so far as the petition discloses, to construct and operate its lines in Delaware, is not entitled to the writ of mandamus. *L. G. Railway v. Comrs. of Coffin Co.*, 6 Kans., 245; Highs Ex. Leg. Rem., Secs., 10, 32, 39.

Second. Both the respondent and the relator being foreign corporations this court has no jurisdiction to proceed by way of mandamus against the respondent. The respondent, as a foreign corporation, cannot be sued here in personam, there being no statutes providing for it. *Peckham v. North Par. in Hev.*, 16 Pick., 274; *Middlebrooks v. S. Fire Ins. Co.*, 14 Conn., 286, 301; *M. Q. v. Md. Manf. Co.*, 16 Johns., 5; *Welsh v.* B. *& L. H. R. R. Co.*, 18 How. (N. Y.) Pr. R., 218; *Burnett v. C. & L. H. R. R. Co.*, 4 Hun., 114. But even upon this that a suit in personam will lie here against a foreign corporation, the remedy by mandamus is improper. The object of the writ is to remedy the abuses of franchises conferred by sovereignty. So the right to act in a corporative capacity as a legal entity, conferred upon the members of an association, is a franchise proceeding only from sovereignty. Upon

what principle, then can the writ of mandamus issue to a foreign corporation, like the respondent, which has never received any grant of power or recognition from the General Assembly of this State. Its authority, under its charter granted in New York State, to do business here will be under the law of comity, but that is comity of the State not merely of the courts, and the essence of it is recognition and is merely permissive and does not erect the foreign corporation into a corporation of the State of Delaware. The respondent owes no duty to the State; is under no contract with the State and having received no exclusive franchise from it is not subject to the extraordinary remedy of mandamus. *Kendall v. U. S.*, 12 Pet., 524, 620. The counsel for the relator has failed to produce a single case in which it has been held that a writ of mandamus will issue against a foreign corporation, where the remedy has not been extended by statute, and where there has been no legislative grant of power to the company.

Levi C. Bird, for the relator: It is not true, as alleged by the respondent, that the B. & O. Telegraph Co. by its charter, was authorized to construct lines of telegraph only in the city of Baltimore and throughout the State of Maryland, but they are authorized to construct, etc., lines of telegraph in the city of Baltimore and throughout the State of Maryland. It is true that the said company has no charter in this State, but it has constructed its lines. It has become a tax-payer to the State. Laws of Delaware, Vol. 16, 671. It has become a public servant in this State and has been granted protection of the laws of the State; has used the highways of the State; has transacted its business here and is amenable to the laws of the State. Will the courts of this State now recognize the company, here doing business, when it petitions for redress to them? Can it sue or be sued here? Could offenders be indicted for cutting the wires of this company under the Act of Assembly of this State? A foreign corporation may come into a sister State and doing business claim the protection of the laws of that State. *Bank of Augusta v. Earle*, 13 Pet., 519, 520. *Fidelity Trust and Safe Deposit Company* (a corporation of the State of Pennsylvania) administrator of Derringer, decd., plaintiff below, plaintiff in error *v. Niven*, administrator, defendant below,

defendant in error. The general principle is that a corporation created in one State can make no valid contract in another, without the latter's sanction, express or implied, but it has been repeatedly decided that not only can a corporation make a contract in other States, but may be sued by service on its agencies in other jurisdictions. And court of justice in one State will, out of comity enforce the laws of another State, when, by such enforcement, they will not violate their own laws or inflict an injury on someone of their own citizens. *Christian Union v. Yount*, 11 Otto., 352, 362; *Runyon v. Coster*, 14 Pet. 122, 132; *Cowell v. Springs Co.*, 100 U. S. Reps. 58, 59, 60; *Lafayette Ins. Co. v. French*, 18 How. 404, 409; *In re Comstock*, 3 Saw, 218, 230; *B. & O. R. R. Co. v. Harris*, 12 Wallace, 65, 78, 81, 86; *Paul v. Virginia*, 1 Wall., 168; *Liverpool Ins. Co. v. Mass.*, 10 Wall., 566; *St. Clair v. Cox*, 16 Otto., 350, 355, 356, 359. In the absence of any restraining statute, corporations created by the laws of any one State are competent, as artificial persons, to bring suit in the courts of other States. *Fisk v. Chicago & C. R. R. Co.*, 4 Abb. Pr. N. S., 378; *Sav. Manuf. Co. v. Armstrong*, 17 Me., 34; *Eslena v. Ames Plow Co.*, 47 Ala., 384; *Williams v. Creswell*, 51 Miss., 817; *Lathrop v. Union Pacific R. R. Co.*, 1 McA., 234. While a corporation is indeed a mere artificial being, invisible and intangible, yet, it is a person for certain purposes in contemplation of law. *Beaston v. The Farmers'. Bank of Delaware*, 12 Pet., 135; *United States v. Amedy*, 11 Wheat., 412. A suit by a corporation, in its corporative name, must be presumed to be a suit by the citizens of the States under whose laws the corporation exists. *Lathrop v. Union Pacf. R. R. Co.*, 1 McAr., 234; *Hatch v. Chicago & C. R. R. Co.*, Blactchf., 105; *Stephens v. Phœnix Ins. Co.*, 41 N. Y., 149; *U. S. v. Ins. Co's.*, 22 Wall., 99.

All charters granted by the Legislature, confer only powers, right and franchises to be enjoyed within the State; but no man can seriously contend for one moment that the State or Courts of Maryland intended to restrict the operations of this company to the confines of her borders, why it was intended to compete and contest with the strongest monopoly that existed in the land in that line of business. But the court has passed upon this very matter in State of Delaware, ex-relatione, *David M. Richardson v. Wil-*

liam H. Swift, President of the Diamond Match Company, current volume. The same question is considered in the opinion of Judge Wallace in *Merchants Manf. Co. v. Grand Trunk Railway Company,* 13 Fed. Rep., 358, 360. Well considered authorities have favored the conclusion that a commercial corporation may be deemed constructively present outside of the State of its origin, wherever it has property, and carries on its operations by its agents; and that service of process upon such agents at such places is good service upon the corporation, even in the absence of local laws authorizing such mode of service. *Moulin v. Ins. Co.,* 1 Dutch., 57; *Bushel v. Commonwealth Ins. Co.,* 15 Serg. & R., 176; *Libby v. Hoddydon,* 9 N. H., 394; *St. Louis Ins. Co. v. Choen,* 9 Mo., 422; *Hoyden v. Androscoggin Mills,* 1 Fed. Rep., 93, 96; *Newby v. Van Oppen,* 41 L. J. Q. B., 148; *Moch. v. Va. Fire Ins. Co.,* 10 Fed. Rep., 696, 70; 701, 702, 703; *Wheeling, etc., Trans. Co. v. B. & O. R. R. Co.,* 1 Cin., 311; *Hann. & C. R. R. Co. v. Crane,* 102 Ill., 249; *Handy v. Aetna Ins. Co.,* 37 Ohio; *Wilson Pack. Co. v. Hunter,* 8 Cent. Law J., 333; *Nichol v. Mercantile, &c.,* 14 Cen. Law J., 51; *Hale v. Cont. L. Ins. Co.,* 12 Fed. Rep., 359; *Lovejoy v. Hartford Co.,* 11 Fed. Rep., 63 and note p. 69; *Good Hope Co. v. Ry. Barb Fence Co.,* 22 Fed. Rep., 625, 637.

Let us see how far telegraph companies (and we are both telegraph companies) may extend their lines in and through States of the Union other and outside of the States which created them. The telegraph is a matter of commerce, just as much so as the railroad, the steamboat, the mail, or the express company. The Congress of the United States has recognized this and spoken in unmistaken tone by an act passed July 24th, 1866, Rev. Stat. U. S., Sec. 5263. Under this law, by Section 5268, before any telegraph company could exercise any of the powers and privileges conferred by the law, such telegraph company was obliged to file their written acceptance with the Postmaster General of the United States of the restrictions and obligations required by this law. Such acceptance has been filed by the relator and was so filed when said relator built its line through this State. The Supreme Court of the United States has fully recognized the telegraph and the sending of telegraph messages as commercial transactions, and to come within the

purview and meaning of that clause of the Constitution of the United States which delares that Congress shall have power "to regulate commerce with foreign nations, and among the several States. *Pensacola Tel. Co. v. Wes. U. Tel. Co.*, 6 Otto., 1-13. The last matter contained in the motion to discharge the rule, is that this court possesses no jurisdiction to proceed by way of mandamus against said respondent. Mandamus is the proper remedy where the law affords no adequate or specific remedy to secure the enforcement of the right and the performance of the duty which it is sought to coerce. High's Ex. Leg. Rem., Sec. 10; *Wood on Mand.*, Pg. 56, 23, 63, 68; 12 Barb., 217; 35 N. T., 396; 1 Ohio St., 77; 44 Ala., 284; 11 Pa. St., 196; 25 Barb., 73; *People v. Supervisors, etc.*, 12 Barb., 27; 26 Ark., 482; *Com. v. Rossiter*, 2 Binn., 360; *Lagram v. State*, 24 Mich., 468; *People v. Thompson*, 25 Barb., 73; 17 Ala., 527; 6 A. & E., 365; *State v. Hart. & New Haven R. R. Co.*, 29 Conn., 538. Mandamus is the proper remedy to enforce a duty as a common carrier—whether such carrier is operating under statutes or at common law. *State of O. Ex. Rel., The Amer. Un. Tel. Co. v. Bell Tel. Co., et al.*, 36 Ohio, 296; *Amer. Un. Tel. Co. v. St. Louis Bell Tel. Co. Cent. L. J.*, Vol. 11, 359, 360; *A. U. Tel. Co. v. St. L. B. Tel. Co.*, Cent. L. J., 10; 45 Barb., 136; High Ex. Leg. Rem., Sec. 320, 322; *Chicago & C. N. W. R. R. Co., v. The People*, 56 Ill., 365, 380-385; *People v. C. & A. C. R. Co.*, 5 Chicago Leg. News, 436; *Hobersham v. Savannah & C. Canal Co.*, 26 Ga. 665-676; In re Trenton Water Power Co., Spen. 659; *People v. Rochester R. R. Co.*, 21 N. Y., Sup. Ct., 371; *Md. & Cinn. R. R. Co. v. The State*, 37 Ind., 489. Have the people of this State any rights which respondents are bound to respect? If they are here rightfully, then they are public servants, and must treat the public without discrimination. When the character of a corporation or the general statute in force and applicable to the subject imposes a specific duty, either in terms or by force, and reasonable construction and implication, and there is no other specific or adequate remedy, the writ of mandamus will be awarded and it will be used for the benefit of private persons, as well as for the public. *Mobile & Ohio R. R. Co. v. Wisdom*, 5 Heisk (Tenn) 125, 151, 155, 156, 157. There is no distinction between a suit at law, and a proceeding by mandamus, where the legal remedy is inade-

quate under the circumstances above stated. High's Ex. Run., Sec. 8; *McBaux v. People*, 50 Ill.. 503, 507; *State v. Bailey*, 7 Iowa, 390; *Judd v. Driver*, 1 Kan., 455; *Wood on Mandamus*, *Com. of Ky. v. Dom. Gov. of Ohio*, 24 How. 66, 97; *Kendall v. U. S.*, 12 Pet., 615; *Kendall v. Stokes, et al.*, 3 How., 100; 4 Ark. 302. If we have a right to proceed in equity, then our proceeding by mandamus remains, and we have our option which to adopt. High's Ex. Leg. Rem., Sec. 20; *The People v. Mayor of New York*, 10 Wend., 395. The principle that seems to lie at the foundation of applications for this writ, and the use of it is, that whenever a legal right exists that party is entitled to a legal remedy, and when all others fail the aid of this may be invoked.

THE COURT, COMEGYS, C. J.:

In this case we are asked to decide, upon a rule to show cause, the question whether the plaintiff in the rule is entitled to ask for it; and if he be, whether he has shown such facts as, if true, would justify the court in granting it. Apparently no more important subject has arisen, for a long time, for decision in this State than that which the papers and argument present, of the right of a foreign corporation to ask for a mandamus to facilitate it in this State of the powers conferred upon it in the State of its creation. Its importance is greatly magnified because of a question which, but for the sufficiency for the purposes of decision of others presented, we should be bound to consider and pass upon. The case before us, does not, however, require that we should go into that subject at any length, and therefore we will pass it.

The difficulty in dealing with the application to make the rule absolute, is that of seeing upon what it can be based. As we conceive, none has been shown to us. Supposing, for the mere sake of the argument, however, that a foreign corporation can have any existence, or capacity, in this State, to be recognized by its courts, without legislative enactment, how can it be claimed that the plaintiff in this case has such, seeing that its operations are expressly confined to the territorial limits of Maryland, whose creation the corporation is? Cases have been presented which decide that where, by the terms of the act of incorporation, or the general law of a State, a corporate body has power to act generally, everywhere,

the States, by comity—that is, gracious favor, extended also by other States to their creations—will allow it to exercise, to a reasonable extent, its powers within them. That is to say, they will allow it to seek redress in their courts for breaches of contract, for example. But this is, obviously *ex gracia* merely. It cannot, in any sense, be claimed as a *right*. The States are independent; and can open their courts, or not, to foreignors, or foreign (that is, as applied to them) corporations. These latter, being mere artificial bodies, and not personal in a sense to entitle them to be treated, in a question such as this, as citizens of another State, the usage of comity which prevails, does not necessarily, or appropriately, exist for them. It is by the comity of a country, its courtesy to another country, that a citizen or subject of the latter is allowed to use its juridicial process. It is true that, so far as citizens of any State of the United States are concerned, there is secured to them, by the Federal Constitution, the same rights, privileges and immunities which citizens, as such, enjoy in their respective States. This is by virtue of, and to consolidate their nationality; but the provision is not for corporate bodies, which are citizens in no sense except for redress of grievances in the courts of the Union. In them they are such by judicial construction. Were corporate bodies entitled to the same recognition as citizens, then all constitutional restraint upon their creation would be nugatory. The provision of our own constitution which requires a vote of two-thirds of each branch of the legislature to pass a corporate act, could be rendered a dead letter by the courts, if comity could clothe a foreign creation with corporate functions here. This is conclusive of the view that, in this State at least, to give a foreign corporation the right to demand a *mandamus* to enable it to use its foreign franchises, something more is needed to insure compliance than the mere invocation of comity.

But the invoked action of comity would be misapplied in a case like that before us—of a corporation expressly limited, by its own charter, to the transaction of business within the limits of the State of Maryland. It is conceivable that a corporate body unrestricted to State territory, and created to pursue a business which might be followed anywhere, should, where there is no constitutional, or legal impediment in the way, be recognized by a State,

and allowed to act in it by courtesy; but where one is expressly, as in this case, confined to the jurisdiction of its birth in its operations, it is not conceivable that it should be allowed to act beyond it. In the nature of its being, it cannot project itself, by any mere recognition of a court into another jurisdiction and act there—for it would have nothing to show in justification, To adopt it in anyway in another State, would be in fact a want of comity on the part of such State—as clothing it with a function which was withheld from it by the act which created it.

Without going any further into the subject, we give as our judgment that the motion in this case ought to be practical, and we therefore order that the rule be discharged.

MELISSA GROSS *v.* CATHARINE SHEELER, Administratrix, d. b. n., c. t. a. of ELHANAN BENNER.

Devise of Personal Property—Rule in Shelley's Case.

The testator directed his real estate to be sold and the income of six hundred dollars to be paid annually to the plaintiff during her natural life and at her death the principal sum to be paid to her heir or heirs in equal proportions. *Held* that the plaintiff was entitled to the income only and not to the principal.

The rule in Shelley's Case has no applicability in the disposition of personal prpperty.

(*New Castle, September, 1885.*)

CASE STATED for the opinion of the court. The facts of the case will appear from the argument of the counsel.

Ignatius C. Grubb, for the plaintiff:

The testator in this case, after directing his house should be sold after the arrival of his son at the age of twenty-one years, said, "The proceeds thereof shall be divided as follows, to wit.: "Item. To my daughter Melissa Ann Boers, intermarried with J. Augustus Boers, the income of six hundred dollars annually during her natural life and at her death the principal sum to her heir or heirs in equal proportion." This gift is a bequest of per-

sonal property, as the law is well settled that where a sale of real estate is ordered by the testator, though in the future, after an intermediate estate, the direction works a conversion. *Bright's Appeal*, 12 Weekly Notes of Cases, 403; *Sharpley v. Townsend*, 4 Harr., 336; Estate of Stevenson, 2 Del. Ch., 197. A gift of the income of a fund is a gift of the fund itself. *Van Rensselaer v. Dunkin's Ex.*, 24 Pa. St., 252; *Butterfield v. Butterfield*, 1 Vesey, Sr., 153; *Train's Exs. v. Fisher*, 15 S. & R., 145; *Parke's Appeal*, 61 Pa. St., 478; *Stevens v. Gornett*, 3 Simmons, 398; *Mannax v. Green*, 4 R. 14 Eq., 456; *Gulick's Exs. v. Gulick*, 25 N. J., Eq., 324; Feare, 464. We have, therefore, in effect a gift of the six hundred dollars to our client for life with remainder to her heir or heirs in equal proportion. Where personal estate is limited directly to or by way of executed trust for a person for life, remainder to or for the heirs of his body, and such limitation would according to the rules laid down in the twelfth chapter of the Rule in Shelly's Case created an estate tail in the first taker or ancester if the subject were real property; the entire interest in the whole vests in him, even though only the use, interest, dividends, or profits are devised to him and the chattels themselves to the heirs of his body. *Smith on Executory Interest*, § 594, 307; *Dow v. Earl of Chatham*, reported by Fearne., 464; *Broughton v. Langley*, 2 Lord Raymond; *Garth v. Baldwin*, 2 Vesey, Sr., 646; *Thubridge v. Kilburn*, 2 Vesey, Sr., 232; *Elton v. Eason*, 19 Vesey, Jr., 73. A gift of the income of personal property for life with remainder after the death to the heir or heirs of the body, gives an absolute estate in the first taker; and the fact that the word "heir" is used here can have no effect on this gift as it is like the word "heirs" a *nomen collectivum*. *Martin Lessee v. Roach*, 1 Harr., 477. Nor does the addition of the words "in equal proportions to the gift to the heirs," make any difference, as that is nothing more than an expression of how the heirs are to take as heirs, and has been uniformly ruled to be insufficient to limit the legal effect of the word heirs. *Smith on Executory Interests*, 472–488; *Cresswell's Appeal*, 5 Wright, 290; *Nice's Appeal*, 14 Wright, 149; *Physick's Appeal*, 14 Wright, 128; *Curtis v. Longstreth*, 8 Wright, 297; *Steiner v. Kalb*, 7 P. F. Smith, 123.

Benjamin Nields, for the defendant:

The executor, by the will, was made trustee for the following purposes. 1. To rent the house and lot of ground, from the death of the testator, until the son, William E. Benner, should arrive at the age of twenty-one years, and pending that time, to expend the proceeds, as in said will directed. 2. When the said son should arrive at the age of twenty-one years, to sell the house and lot of ground, and pay all expenses attending the sale and settlement of that part of testator's estate. 3. To divide (pay) to Melissa Ann Boers, the income of six hundred dollars, annually, during her natural life, and at her death the principal sum to heir or heirs in equal proportions. To divide the income of six hundred dollars "annually during her natural life," can have no other meaning than pay the income of six hundred dollars annually during her natural life, and this payment could be made by no other person than the executor, who was the trustee appointed under the will for that purpose, and it is necessary that he should receive the income before he can (divide) pay it over, annually, to the beneficiary. The purposes of the trust, therefore, roquire that the six hundred dollars should remain in the hands of the trustee during the natural life of Melissa Ann Boers. The trust is an active trust and continues active during the life of Melissa Ann. A devise of real estate to a trustee, in trust, to pay the rents and profits to "A" vests the legal estate in the trustee. *Hawkins on Will*, 140. Where an estate is limited to trustees and the words used are "in trust to pay to" a specified person the rents and profits of the land, then the trustees take the legal estate because they must receive before they can make the required payments; but where the words are "in trust to permit and suffer A. B. to takes the rents and profits" then the use is divested out of them and executed in the party; the purposes of the trust not requiring that the legal estate should remain in them. *Barker v. Greenwook*, 4 M. & W., 429. The testator in this case directed his executor to sell his house and lot of ground, and the proceeds thereof to be divided, etc.; he therefore ordered his real estate to be converted into personalty, and as personalty to pass from his executors to the persons named in the will. A bequest of the income of personal estate, without limit as

to time, is equivalent to a gift of the principal. *Hawkins on Wills*, 123. "A gift for life of a chattel is a gift of the use only, and the remainder over is good as an executory devise. This limitation over in remainder is good as to every species of chattels of a durable nature; and there is no difference in this respect between money and any other chattel interest. *Corenhoen v. Shuler 2*, 122. The bequest of the use of a residue for life, or any shorter period, does not give the legatee the right to the possession of the fund in the meantime, and that the executor should either retain the fund and pay over the income thereof to the legatee, as it accrues; or he should take ample security for the return of the principal at the termination of the particular estate therein, if he suffers it to go into the hands of the legatees." *Clark v. Clark*, 8 Paige, 152; *Cairns v. Chanbert*, 9 Paige, 163; *Ackerman v. Vreeland*, 1 McCarter (N. J.), 23, 27, 28; *Morgan v. Morgan*, 14 Beav., 72; *Crowe v. Gisford*, 17 Beav., 507; *Jebt v. Tugwell*, 20 Beav., 84; *Hood v. Clapham*, 19 Beav., 90; *Marshall v. Brenner*. 2 Im. & Giff., 237; *Patterson v. Deolin*, 1 M. Mullan (S. C.) 459. In no case has the court ever held that where a bequest is given to trustees to pay the income of personal estate to A. for life, and at his death to pay the principal sum to his heirs, that A is entitled to the bequest absolutely. *Smith v. Butcher*, 10 Chancery Division Law Reports, 113, decided in 1878. *Low v. Smith*, 2 Jurist N. S., 344; *Bently v. Kauffman*, 86 Pa., 99. In the interpretration of a will, in order to gather the testators intention, the words *income* and *interest* as contra-distinguished from the corpus or principal and enjoyment for life only have an important bearing. Earp's Appeal, 25, P. T. Smith, 119; Ozden's Appeal, 20 Id. 501. When the intent clearly appears to carry the corpus or principal over to others the words of the will must be permitted to have their proper force. Here the bequest of the interest only for life, connected with the provision immediately following is inconsistent with an intent to confer the principal absolutely." In the case at issue, it is clear that it was not the intention of the testator that Melissa Ann Boers should have the corpus or principal, but only the income thereof, annually, during her natural life, and at her death then the corpus or principal to go to her heirs in equal proportions. Here the executor is made the legal holder of the fund.

Melissa Ann has a life interest in the income; that is all the testator gave her, all that he intended to give her, and her heir or heirs at law take the remainder in equal proportions as personæ designatæ.

Anderson, for the plaintiff:

The executor is not a trustee at all; he is first, executor; secondly, guardian of the minor, and so expressly called in the will, and at the termination of his guardianship he finishes his duties as executor by selling the real estate. The duty is not even put upon him of distributing the proceeds, much less of holding the legal title to it, or investing it in such securities that he might deem best, and paying over the income to the plaintiff. On the contrary the will reads: "And the proceeds thereof (the sale), after deducting sufficient to pay all expenses attending the sale and settlement of this part of my estate shall be divided as follows, to wit.: " Item. To my daughter, Melissa Ann Boers, intermarried with J. Augustus Boers, the income, etc." Could there possibly be a more direct gift without the intervention of a trustee? The right to this fund vested in the plaintiff immediately at the sale. There is not a word about a trustee, or investment by one; there is no duty put upon the executor except such as every executor has who is directed to sell property, and the case is as clearly and as squarely within the rule laid down by *Smith on Executory Interest* as it is possible for a cause to be. The language used in *Barker v. Greenwook*, *Hawkins on Wills*, and in *Kent's Commentaries* has, and the numerous cases cited in relation to the bequest of a use for life have no application to this case, as they relate to a devise in trust, while there is no such devise here. *Parker's Appeal*, 61 Pa. St., 478, cited by us, is, however, directly in point. The defendant further states in his argument: " In no case has the court ever held that where a bequest is given to trustees to pay the income of personal estate to A. for life, and at his death to pay the principle sum to his heirs, that A. is entitled to the bequest absolutely." This may be true where the estate is so given to trustees that the first taker has an equitable interest and the remainder is legal; for there is a difference in the character of the estates that prevents them

being joined; but it is certainly not true when, as in this case both the estates are legal and there is no trustee with any duties to perform.

The defendant's argument in this case seems to be based wholly on the supposition that words of this will have created an active trust in the executor, and the plaintiff has an equitable not a legal right to this fund, there is not a word in the will to sustain such a conclusion.

COMEGYS, C. J.: The testator, who was the owner of the house and lot 915 Market street, Wilmington, by his will, which is part of the record, after directing the property to be rented by his executor and the proceeds to be annually applied, first, to keeping the property in order, and the balance, or the whole, as the case might be, appropriated by the guardian of his son, William E. Benner, to clothing and educating him during his minority, devised, in substance, that when his son came of age, the property should be sold by his executor and the proceeds, after expense of sale, etc., be divided thus—"to my daughter, Melissa Ann Boers, intermarried with J. Augustus Boers, the income of six hundred dollars annually during her natural life, and at her death the principal sum to her heir or heirs in equal proportions, etc.

It will be observed at once in reading the will, as recited in the case, that this devise is different in language from that used in disposing of the residue of the fund arising from the sale. In the case of Caroline Sheeler, there is no bequest of the income of the principal mentioned in the devise with respect to her, but the bequest is to her and her heirs—clear words of fee-simple. So in the disposition of the balance in favor of the son, the direction is that it is to be "invested in real estate or paid over to him if required." Then comes these words—"this balance or remaining sum I give and bequeath to him and his heirs."

In view of this, I am unable to see how the conclusion can be avoided that the testator only meant to give his daughter Melissa the income of six hundred dollars of the proceeds during her lifetime, and the principal at her death to others, who were to take independent of her. Such intention seems perfectly manifest. What is there then in the way of the court deciding accordingly? The

plaintiff says—the rule in Shelley's case; a rule which has done more to produce litigation, and (when sustained) thwart the actual purpose of a testator than all the other arbitrary rules combined. While it remains a rule of law and of property this court must abide by it; but where in the construction of a will it is not clearly and indisputably applicable, no countenance should be given to it.

It is certainly true that if the devise in this case were of the land itself, the plaintiff would take a fee simple; it would then be to her for life, and after her death to her heirs, which, by the rule referred to would operate a fee simple. But this is not a devise of the land, for it is ordered to be sold on the attainment by the son of his majority, and the proceeds divided and disposed of as directed by the will.

Although it is true, that where real estate is directed to be sold and the proceeds paid to certain beneficiaries, they may take the land itself in lieu of such proceeds, and thus become seized of the legal estate, and entitled to possession, yet until that be done, they cannot be said to have title to the property except in the sense of keeping it from becoming abeyant, if they be heirs at law. The direction by the testator to sell the property, and sale made accordingly (as in this case) is a conversion of it, and the proceeds become personalty, for the purposes mentioned, as if they had always been such. The case of *Sharply and wife v. Townsend's Exr.*, 4 Harrington, 336, shows this. When the sale took place, then the proceeds became personalty in the hands of the executor for the specific purpose declared by the testator. This much is plain; in fact there does not seem to be any contention between the parties about it.

The claim of the plaintiff rests wholly upon the rule in Shelly's case. I have already said in effect that if the subject of the action were land, and not personal estate, she would be entitled to it in fee simple according to that rule. But it is not land, but money.

The learned counsel for the plaintiff, in support of their contention, have referred to us a number of cases; but all of them except those in Pennsylvania, simply sustain an ancient rule that personalty cannot be entailed, and that the tenant for life takes the absolute interest; the rule in Shelly's case has nothing to do with them. The citations from the Pennsylvania Reports

appear to be all of them, cases of real estate, as to the application of the rule to which there can be no mistake.

No case has been cited by the plaintiff's counsel where it has ever been held that the rule in Shelley's case applies to personalty; and we have the emphatic language to the contrary, if it were needed, of a lately deceased Master of the Rolls, Sir George Jessel, one of the greatest lawyers of this century, pronounced in 1878 in the case of *Smith v. Butcher*, L. R. Chan. Div., 10, where the testator had desired the rest of his personal property, of debts due him, money in the funds or otherwise, for the sale of his furniture, books, or from any other source, should be placed in the public funds, "and the interest arising therefrom to be equally divided among the children of my brother during their lives, and on the decease of either of them, his or her share of the principal, to go to his or her lawful heir or heirs." He said, after discussing the question, *in his manner*, "I hold that the testator has used expressions which mean that the right heirs of the children are to take, and I so decide."

I am of opinion that, in the case before us, the plaintiff is not entitled to the sum of six hundred dollars mentioned in the bequest concerning her, but only its income for her life.

FARMERS' BANK *v.* HENRY L. TATNALL.

Guaranty—Acceptance—Notice to Guarantor.

A party tendering a guaranty for future and prospective credits is entitled to notice of acceptance of the same, and without such notice will not be held liable. Said notice must be given within a reasonable time after the acceptance of the guaranty. Making the proposed advances is not such an acceptance of the guaranty as will bind the party tendering the same.

On April 1, 1883, the plaintiff gave notice to the defendant of the default of a third party to meet certain paper which had been discounted by the said plaintiff on the faith of a written guaranty from defendant. The guaranty was dated February 14, 1882, and no notice of the acceptance of the same had ever been given by plaintiff to defendant, other than the notice of April 1, 1883. Said notice is not within a reasonable time as required in law.

(*New Castle, September, 1885.*)

ACTION OF COVENANT.

The defendant demurred to the declaration of the plaintiff, upon which the case came before the Court for argument.

The plaintiff declared specially on the following agreement received from the defendant:

"I, Henry L. Tatnall, of the city of Wilmington, Delaware, do hereby request that the Farmers' Bank of the State of Delaware, at Wilmington, do from time to time discount to the credit of the firm of H. L. Tatnall & Co., such negotiable paper as they may offer to said Bank, whether as makers or endorsers; and in consideration of the discounting by the said Bank, at any time hereafter, of any such negotiable paper, I do hereby for myself, my executors and administrators, guarantee to the said Bank the prompt and full payment at maturity of any and all such paper so to be discounted as aforesaid.

"Witness my hand and seal this 14th day of February, A. D., 1882.

H. L. TATNALL. [SEAL.]"

"Signed, sealed and delivered in presence of
WM. P. TAYLOR."

And alleged that in consideration of said agreement, it did on the fourth day of October, 1882, discount to the credit of the said firm of H. L. Tatnall & Co., a note made by John Walker, payable to the order of H. L. Tatnall & Co., at the National Bank of Delaware, for the sum of $451.90, at three months from October 3d, 1882, and that it discounted to the credit of said firm of H. L. Tatnall & Co., sundry other notes thereafter, the last one having been discounted on the 23d day of December, 1882, and that said notes were not paid at their maturity, or at any time since, of which the defendant on the first day of April, 1883, had notice. The narr contains no averment of notice of the acceptance of the guaranty by plaintiff nor of any demand of payment from H. L. Tatnall & Co. other than the presentment for payment at the times and places specified in the discounted paper.

Benjamin Nields, for defendant:

It appears by the allegations in the first and second counts of the plaintiff's declaration:

1. That the first note discounted by the bank to the credit of H. L. Tatnall & Co. was not discounted until two hundred and thirty-two days after the date of the instrument declared on.

2. That the only notice given to the defendant after the date of said instrument and prior to the commencement of this suit was the notice of April 1st, 1883, that the notes had not been paid at their maturity, or at any time thereafter.

3. That the notice given on April 1st was not given until near six months after the first note had been discounted, and three months after the same became due, and that the same was not given until thirty-two days after the last note discounted became due.

It is not alleged in either of said counts that the plaintiff at any time gave the defendant notice that the offer of guarantee had been accepted by said plaintiff, or that it had discounted to the credit of H. L. Tatnall & Co., negotiable paper on the faith of said guarantee, or that the plaintiff ever gave notice to the defendant of the amount of paper discounted to the credit of said H. L. Tatnall & Co., or that a demand of payment had ever been made on the firm of H. L. Tatnall & Co., the principal debtors of the sum sued for.

It is not alleged in the third count that the plaintiff gave any notice to the defendant whatever after the date of said instrument, and prior to the commencement of this suit. The instrument declared on is a request on the part of the defendant that the Bank would from time to time discount for H. L. Tatnall & Co. such negotiable paper as they might offer as makers or endorsers, and the defendant thereby offered, if the Bank would discount such paper, to guarantee the payment thereof at maturity.

1. The instrument declared on is an offer to guarantee, and cannot bind the defendant until accepted by the plaintiff, and notice of such acceptance has been communicated to the defendant by the plaintiff.

2. The instrument is an offer of a continuing guarantee, and the plaintiff, after the discounts were actually made, should have given the defendant notice of such discounts, and the amount

thereof; and also notified him that the plaintiff relied upon the guarantee to insure the repayment of said notes.

3. That the plaintiff must allege and prove that a demand of payment had been made of H. L. Tatnall & Co., the principal debtors, of the debt sued for, and in case of non-payment by them, that notice of such demand and non-payment should have been given in a reasonable time to the defendant, and in failure of such allegation and proof, the defendant is in law discharged.

As to the first point: The instrument shows on its face that there was no consideration whatever paid by the plaintiff, or received by the defendant at the time it was executed by the defendant; that it was simply a request by the defendant to the bank, to discount from time to time to the credit of H. L. Tatnall & Co., such negotiable paper as they might offer to the Bank, whether as makers or endorsers; and the defendant offered in consideration of the discounting by the Bank at any time thereafter of any such paper, to guarantee to the said Bank the prompt and full payment at maturity of any and all such paper so to be discounted as aforesaid. But the instrument created no binding obligation on the defendant unless acted upon by the plaintiff, and until acted upon it was revocable at any time by the defendant. *Offord v. Davies*, Common Bench, N. S., Vol. 12, 748 (E. C. L. R., 104); *Baylies on Sureties*, 8-9; *Jordan v. Dobbins*, 122 Mass., 168.

The acceptance of an offer must be communicated to the person making the offer in order to bind him; an acceptance not communicated will not create a contract. *Leake on Contracts*, 34. A contract of guarantee is usually made in the form of an offer or request, acceded to by acting on it. So a guarantee for advances of money, or of goods, is usually made in the above form (offer), and is accepted by making the advances. It is not binding until acted upon, and notice given to the guarantor that it is put in action. *Leake on Contracts*, 53; 1 M. & S., 557; 8 Ex., 185; *Mussey v. Raynor*, 22 Pick., 223; *Morrow v. Waty*, 18 Pa., 118; *Parsons on Contracts*, Vol. 1, 501 and 517; *Russell v. Clark*, 7 Cranch, 69; *Douglass v. Reynolds*, 7 Pet., 113; *Lee v. Dick*, 10 Peters, 482; *Adams v. Jones*, 12 Peters, 207; *Lord v. Abel*, 18 Conn., 521; *Allen v. Pike*, 3 Cushing, 238.

It is alleged in the first and second counts of the plaintiff's decla-

ration, that on the fourteenth day of February, 1882, in and by certain articles of agreement then and there made by and between the plaintiff and defendant, the said defendant did thereby covenant, promise and agree to and with the said plaintiff in the words and figures following, and it then sets forth the instrument in words and figures, which instrument we have shown by the authorities above cited is in no respect an agreement. It nowhere appears in, or by it, that the plaintiff agreed to do any thing, and as we have shown that it by itself created no obligation on the part of the defendant. The defendant was not bound by the instrument as set forth in words and figures, then certainly the plaintiff was not; therefore the allegation by the plaintiff that the instrument as set forth in words and figures constituted an agreement between the plaintiff and the defendant is a mistake. There was no agreement. "For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is that until it is accepted, and notice of its acceptance given to the guarantor, there is no contract between the guarantor and guarantee; the reason being that the writing is merely an offer to guarantee the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. The plaintiff before he can recover in this suit must allege and prove an acceptance of an offer on the part of the plaintiff and that such acceptance was communicated to the defendant; he has not so alleged and therefore cannot recover.

The writing is an offer of a continuing guaranty of debts, thereafter to be created, the amount of which debts is not known, and the time for which the guaranty is to continue is uncertain. It appears by the plaintiff's declaration that the first note discounted after the date of the writing was on the fourth day of October, 1882, over seven months thereafter, and no notice whatever was given by the plaintiff to the defendant, that the plaintiff had acted upon the offer of guaranty or had discounted said note to the credit of H. L. Tatnall & Co. The only notice whatever alleged in the declaration to have been given by the plaintiff to the defendant is a notice alleged to have been given him on the first of April, 1883, which was that the above mentioned note and other promissory notes thereafter so discounted had not been paid.

Where a letter of credit given for a debt, about to be created, and uncertain in its amount, so that the party cannot know beforehand whether he is to be ultimately liable, nor to what amount, it is necessary in order to charge him that he should have notice, in a reasonable time, that the guaranty is accepted, and of the amount of debt under it. *Norton et al. v. Eastman*, 4 Greenleaf, 521; *Cremer v. Higginson*, 1 Mason, 323; *Edmonstone v. Drake & Mitchell*, 5 Peters, 624; *Craft v. Isham*, 13 Conn., 28; *Clark and others v. Remington*, 11 Mitchell, 361.

The plaintiff in his declaration does not allege that any demand of payment ever was made of H. L. Tatnall & Co., the principal debtors, nor is it alleged that notice of such demand and non-payment was ever given the defendant. The only notice alleged to have been given to the defendant is "That neither the said promissory notes so discounted as aforesaid, nor any of them, nor any part thereof, were or have been paid, either at their maturity, respectively, or at any time since, of which the said defendant afterwards, to wit., on the first day of April, A. D. 1883, had notice."

There must be reasonable notice of the amount advanced, and of non-payment by the principal debtor. *Howe v. Nichols*, 22 Me., 175; *Douglass v. Reynolds*, 7 Peters, 424; *Parsons on Contracts*, Vol. I, 516; *Bay & Bro. v. Thompson et al.*, Pa. Rep., 1 Pearson, 557; *Lawson et al. v. Townes, Oliver & Co.*, 2 Ala., 373.

If it is claimed by the plaintiff that there was a contract subsisting between the plaintiff and the defendant on the fourteenth day of February, 1882, by virtue of the paper writings set forth, then we claim that such contract is void under the statute of frauds for the reason that it was not an agreement to guarantee the payment of an antecedent debt but debts thereafter to be created. There was no consideration passing from the plaintiff to the defendant or from the plaintiff to the original debtors. The contract was therefore void for want of consideration, if claimed to be a subsisting contract at its date. The agreement could not become a valid contract under the statute of frauds until credit was given the firm of H. L. Tatnall & Co., on the faith of it. The instrument expressly states "in consideration of the discounting by said bank of any such paper;" that is the consideration and the only consideration mentioned in

the paper writing, and the agreement could not become a valid contract until this consideration was supplied. *Addison on Contracts*, 654; *Roquet v. Kneeland*, 13 Wend., 114, 121, 122. Under 19 and 21 Victoria, 1856.

Consideration need not appear on the face of the written instrument. *Smith on Contracts*, 115. The statute of frauds provides that "no action shall be brought whereby to charge any person upon any agreement * * * to answer for the debt, default or miscarriage of another * * * unless the same shall be reduced to writing or some memorandum or note thereof, shall be signed by the party to be charged therewith." The memorandum must include a statement of the consideration of such agreement. *Addison on Contracts*, 654. All cases of guaranty are within the statute of frauds. *Smith on Contracts*, 106.

Walter H. Hayes, for the plaintiff:

The instrument sued on in this action is not an offer. An offer is a proposition to do a thing. 2 Bouvier Law. Dict., tit. offer. But is a complete contract. *Bradbury v. Morgan*, 1 H. & M. C., 249, 254. There is nothing on the face of the guaranty in this case that indicates that the parties intended there should be any further negotiations between them, but on the other hand, the defendant "signed, sealed and delivered" the guaranty, as is attested by the subscribing witness. This attestation, on the face of the deed, must be taken to be true until it is impeached. *Stout v. Kean*, 3 Marr., 82, 83. The signing, sealing and delivery are admitted by the demurrer, *Pearce v. Provost*, 4 Hous., 467. To constitute an effectual delivery of an instrument, there must be an acceptance by the other party, and such acceptance is an essential part of the delivery, *3 Reed on State Frauds*, Sec. 1068; *Jackson v. Richards*, 6 Cow., 617; *Church v. Gilman*, 15 Wend., 656. Where a deed or other instrument is handed over by the party making it, to the other party, and nothing further appears, the law presumes that the instrument is made according to the agreement of the parties, and that the party to whom the instrument is handed over accepts the contract in fulfillment of the agreement between them. *Fouda v. Sage*, 40 Barb., 1091 (123, 124); *Pope v. An-*

drews, 9 Carr. & P., 564 (38 E. C. L.). The delivery was the culmination of all the negotiations of the parties, and is the final act, without which all the other formalities were ineffectual, *Younge v. Guilbeaw*, 3 Wall., 636 (641). This is not an offer to guarantee, but is an absolute undertaking by the defendant that any notes discounted by the Bank for H. L. Tatnall & Co., at any time after the making of the guaranty, would be promptly and fully paid at maturity. *Baylies on Guarantees and Sureties*, 17; *Leake on Contracts*, 53; *Add. on Contracts*, 17, 1115; *McIver v. Richardson*, 1 M. & S., 557; *Kennaway v. Trellean*, 5 M. & W., 498 (500); *Canton v. Shaw*, 2 Harr. & Gil., 13; *Whitney v. Groot*, 24 Wend., 82; *Douglass v. Howland*, ibid., 35 (49); *Smith v. Dunn*, 6 Hill., 543; *Bank v. Coster*, 3 Comst., 203 (53 Am. D., 280); *Bank v. Phelps*, 86 N. Y., 484 (493); *Breed v. Hillhouse*, 7 Conn., 522; *Gray v. Edgerton*, 19 Ohio St., 49 (S. C. 2 Am. Rep., 422; *Mitchell v. McCleavy*, 42 Md., 375; *Bank v. Mitchell*, 15 Conn., 296; *Bright v. McKnight*, 1 Sneed., 158; *Vancy v. Brown*, 3 Sneed., 89. No particular form of words is required to constitute a contract of guaranty. Baylis, 26; Brandt, Sec. 2; Guaranties are to be governed by the same rules of construction as other contracts. Baylies, 111. 120; DeColyar, 212; *Mason v. Pritchard*, 12 East., 227; *Mayer v. Isaac*, 6 M. & W., 605; *Horgreave v.* Smee, 6 Bing., 249 (19 E. C. L.); *Edward v. Jarvis*, 8 Man. G. & S. 436 (444) 65 E. C. L.; *Lawrence v. McCalmont*, 2 How., 426 (15 U. S. S. C., 183). In a solemn contract under seal, we are not to reject the words of the parties as a mere abstraction. *Randall v. Canal Co.*, 1 Harr., 157 (174).

An absolute present guarantee, complete in its terms, takes effect as soon as it is acted on, without notice of its acceptance. *Baylis*, 197-199; *Bright v. McKnight*, 1 Sneed (Tenn.), 158; *Yancy v. Brown*, 3 Sneed (Tenn.), 89; *Bank v. Kercheval*, 2 Mich., 504, 511; *Bank v. Mitchell*, 15 Conn., 219; *Paige v. Parker*, 8 Gray, 211; *Powers v. Bumcratz*, 12 Ohio St., 273. So where the guarantor and creditor reside in the same city, and an agreement to accept a guaranty is contemporaneous with the guaranty, no notice of acceptance is required to render the guaranty absolute. *Baylis*, 198; *Walker v. Forbes*, 25, Ala., 139, 60, Am. D. 498-561; *Wilde v. Savage*, Ibid; *Bank v. Sinclair*, 60 N. H., 100; *Pope v. An-*

drews, 9 Carr P., 564, 38 E. C. L., 230. If the defendant intends that notice of acceptance should be a condition precedent, he should have made it so by express terms. *Leakes Cont.*, 643; *Add. Cont.*, Sec. 17; *Wheelton v. Hardisty*, 8 E. & G., 232, 92, E. C. L., 302. The allegations that the defendant "in and by his certain articles of agreement, &c. * * * which said articles of agreement, sealed with the seal of the said defendant, the said plaintiff now brings here into court, the said defendant did thereby covenant, promise and agree to and with the said plaintiff, &c., taken in connection with the attestation clause of the instrument as set out as follows: "signed, sealed and delivered in the presence of Wm. P. Taylor," is a good and sufficient averment of a complete contract between the parties; the attestation must be taken to be true until it is impeached. *Stout v. Kean*, 3 Harr., 82; *Clayton v. Morris*, 4 Harr., 357; *Higgins v. Bogan*, 4 Harr., 331; *Wain v. Wolters*, 5 East, 10. Under these averments, the plaintiff would be permitted to prove, as a necessary part of the making of the contract, the acceptance of it by the plaintiff, and the acceptance need not be proven in any particular manner, but may be implied from the circumstances. *Baylis*, 397; *Reynolds et. al. v. Douglass*, 12 *Peters*, 497; *Taylor v. McClung's Ex'rs.*, 2 Houst., 24; *Bank v. Mitchell*, 15 Conn., 206.

The execution and delivery of the instrument being admitted, acceptance of it by the Bank will be presumed from the fact that it is in the possession of the plaintiff, and an averment of notice of acceptance is unnecessary. *Bank v. Ridgely*, 1 Harr. & Gill., 224; *Milbourn v. Glover*, 3 Md., 212; *Pannell v. Williams*, 8 Gill & J., 511; *Leake on Cont.*, 136; DeColyor, 214; 1 Add. Cont. Sec. 26; *Goodright v. Straphen*, Cowp., 201; *Tupper v. Foulkes*, 9 C. B. N. S., 797. A guaranty signed by the defendant and acted on by the plaintiff, without any express verbal acceptance is sufficient. *DeColyer*, 189; *Banking Co. v. Eccles*, 4 H. & N., 139; *Offord v. Davies*, 12 C. B. N. S., 747 (E. C. L.); *Noyes v. v. Nichols*, 28 Vt., 160. Where the *payment* of a note is guaranteed by the indorser or guarantor, it disposes with the necessity of *demand* and *notice*. *Campston v. McNair*, 1 Wend., 457; *Pyle v. McMonagle*, 2 Harr., 468. Evidence is admissible, not to vary the guaranty itself, but to show the circumstances under which it was

made. Leake, 213; Baylies, 120, 127; *Bainbridge v. Wade*, 16 Ad. & El. (71 E. C. L.) 89; *Bank v. Coster*, 3 N. Y. (Comst.) 203; *Ins. Co. v. Carter*, 66 N. Y., 326; *Reed v. Ins. Co.*, 5 Otto., 31. Evidence being thus admissible to prove the surrounding circumstances (which would show a request by the bank to the defendant, for the guaranty, in answer to which he gave it) at the time of making the contract, and it being incumbent on the plaintiff to prove his allegation that the defendant did covenant, agree, &c., as well as the execution of the contract, including the delivery, this would *ex vi termini* prove the acceptance of the guaranty, as it (acceptance) is inseparable from the delivery, as the cases first cited go to show. Baylies, 199, 200; Leake, 140, 146; Decolyer, 4, 5; 2 Blk. Com., 448; Add. Cont., Sec. 20; Story Cont., Sec. 490; *Bank v. Mitchell*, 15 Conn., 206; *Reynolds v. Douglass*, 12 Peters, 497; *Davis v. Wells*, 14 Otto., 159; *Lowry v. Adams*, 22 Vt., 160.

All that is required of the party guaranteed, after the acceptance of the guaranty, is to make a demand on the debtor, when the credit has expired, or upon his default, to give notice thereof within a reasonable time afterwards to the guarantor. The rule being that, if the guarantee fails to so notify the guarantor of the default of the principal debtor, and loss of damages thereby ensue to the guarantor, then to that extent, the guarantor is discharged; but both the laches of the plaintiff and a loss or damage to the defendant must concur to constitute a defence. Brandt. Secs., 163; Baylies, 198; 1 Wharton, 570; *Wilde v. Savage*, 1 Story, 22; *Douglass v. Reynolds*, 7 Peters, 113; *Babcock v. Bryant*, 12 Pick., 133; *Lowe v. Beckwith*, 14 Mon. (Ky.), 184; 58 Am. D., 659; *Van Wort v. Wooley*, 3 Barnes & Cress., 439 (10 E. C. L.); *Vinae v. Richardson*, 13 Allen, 521. But we allege a presentment of each note for payment on the day, and at the place of payment, the non-payment, by H. L. Tatnall & Co., or any other of the makers, of which H. L. Tatnall & Co. had notice on those days, and that the defendant did not, at the maturity of the said notes, pay the several sums therein specified; that he had notice of the premises on the first day of April, 1883, five days after the last note was payable (the James H. Seaney note for four hundred dollars was due on the twenty-sixth day of March, 1885). The request or demand on the defendant being only five days after the close of the

transactions, was in a reasonable time, and is sufficiently averred. Leake, 643, 645, 646; *Baylies on Bills*, 203; Baylies, 204; Brandt. Sec., 168; *Lilly v. Hewit*, 11 Prince, 175 (5 Exchq., 175, 182); *Walton v. Marshall*, 13 M. & W., 72; *Somerville v. Barnaby*, Cro. Jac., 287; *Warrington v. Farbor*, 8 East., 242; *Hitchcock v. Humfreys*, 5 Man. & Gran., 297 (44 E. C. L.); *Allen v. Rightmere*, 20 Johns., 365; *Gibbs v. Commons*, 9 S. & R., 19; *Clay v. Edgerton*, 19 Ohio St., 549; *March v. Putney*, 56 N. H., 34.

If there be any matter of discharge arising from want of notice, or otherwise, it must be pleaded. *White v. Woodward*, 5 Man. G. & Scott, 810, 816. And the fact of loss or damage must appear affirmately. *Van Wort v. Wooley*, 3 B. & C., 439, 449 (10 E. C. L.) Want of notice is invariably treated as matter of defense, by way of discharge, from the contract, and not merely of law to defeat the suit on the contract. *Bushwell v. Church*, 15 Conn., 406; *Simon v. Steele*, 36 N. H., 73, 81. It is not necessary, in general, to charge the surety, to make a demand on the principal debtor, where it is not necessary to charge the debtor himself. Leake, 646. The presentment at the proper time, at the place of payment, and the notice of non-payment to H. L. Tatnall & Co., in due time (all of which are alleged), fixed their liability. *Bank v. Cooper*, 1 Harr., 10.

The defendant is estopped to deny that there was a consideration for the guaranty, as it is under his seal. The fourth demurrer raises a question of *fact*, and is bad for that reason. *Prince v. Weaver*, 13 Gray, 273. As a consideration is not necessary to the validity of a *sealed* instrument, so none need be set forth in a guaranty under seal, the sealing and delivery on the one side, and the acceptance or assent on the other, giving force and effect to the agreement, and rendering *further evidence superfluous*. Leake's, 140, 146; 72 Smith's Lead Cas. pt. 1, 283 (1884); DeColyer, 20, 21, 178, 1, 2; Baylies 58, 26; Brandt, Sec. 6, 68; Add. Cont., Sec. 495, 682; *Douglass v. Howland*, 24 Wend., 35; *Childs v. Banum*, 11 Barb., 14; *McKensie v. Farrell*, 4 Bosworth (N. Y.,) 192; *Cherry v. Henning*, 4 Wels. H. & H., 631. The statute of frauds, which was made to prevent perjuries and frauds, does not apply to this case, as at common law the parties to a contract under seal, were not permitted to vary it by parol evidence; nor does that

statute apply to covenants. Add. Cont., Sec. 48; *Cherry v. Henning*, (4 Wels. H. & G., 647; *Livingston v. Tremer*, 4 Johns, 416.

But aside from the fact that the instrument is under seal, the consideration stated on the face of the guarantee is sufficient. *Brown St. of Frauds*, Sec. 198; Add. Cont. Secs. 9, 12, 16; Leak's Cont., 245; Brandt Secs., 6, 7; De Colyer, 20, 21; 2 Smith's Lea. Cas., pt. 1, 291 (1885.) It is generally held in this country, that where the promise itself has been reduced to writing, with a sufficient clearness to exclude the danger of fraud, and render it certain that the guarantor meant to render himself answerable, the end of the statute is attained and the consideration may be shown by parol. 2 Smith's Lead. Cas. pt. 1, 291; *Packard v. Richardson*, 17 Mass., 122; *Sage v. Wilcox*, 6 Conn., 81; *Lent v. Poddleford* 10 Mass., 230; *Reed v. Evans*, 17 Ohio, 128; *Brown St. of Frauds*, Sec. 399-405.

Any act in the nature of a benefit to a guarantor, or to any other person at his request, is a sufficient consideration for the agreement of the guarantor. Baylies, 58; *Welsin & Lane v. Porter*, 4 Hous., 236; *Short v. Prettyman*, 1 Hous., 334.

George H. Bates, on the same side:

COMEGYS, C. J., delivered the opinion of the Court (Houston, J., dissenting):

After having bestowed a great deal of reflection upon the question raised by the demurrer, and having considered the authorities and weighed the arguments of counsel, I have arrived at the conclusion that the declaration is defective in not averring notice to the defendant, or excuse for want of it, of acceptance of his proposal by the plaintiff.

I think that no greater variety can be found in any class of legal contracts than those of guaranty. The one which is the cause of action in this suit is different in its language from any other that I have seen; but nevertheless it is in its quality and effect, like a great many others which have undergone judicial examination. It is in these words:

"I, Henry L. Tatnall, of the city of Wilmington, Delaware,

do hereby request that the Farmers' Bank of the State of Delaware at Wilmington, do from time to time discount to the credit of the the firm of H. L. Tatnall & Co. such negotiable paper as they may offer to said Bank, whether as maker or indorser; and in consideration of the discounting by the said Bank at any time hereafter of any such negotiable paper, I do hereby, for myself, my executors and administrators, guarantee to the said Bank the prompt and full payment at maturity of any and all such paper so to be discounted as aforesaid.

"Witness my hand and seal this 14th day of February, A. D. 1882.

(Signed.) H. L. TATNALL. [SEAL.]"

"Signed, sealed and delivered in presence of
WM. P. TAYLOR."

There is a consideration stated in the paper, which renders unnecessary the presumption of valuable consideration the law would raise from the existence of the seal. We must, therefore, take the expressed consideration as the only one existing; it was the future credit desired to be given the firm of H. L. Tatnall & Co. In like cases, the writing is to be treated as an offer to become bound. Until it is accepted, it is not binding upon the offerer. He may recall it before it is acted upon, but not afterwards, for it has then been accepted, and is a valid agreement binding the guarantor. The consideration stipulated for has been performed. It is thus like the case of one who calls upon another to sell goods (for example) to a third person, promising in legal form that if he should do so, he the promisor will guarantee him against loss in so doing. Such an agreement means that the promisor undertakes to pay the debt contracted at his request, if the principal debtor should not do it.

As it is not a complete contract in the beginning—it being a proposal or offer proceeding from one person to another—if it should be accepted by such other, he ought to give notice to that effect in a reasonable time to the proposer. Until this be done, there cannot be said to be that *aggregatio mentium*, or *consensus*, necessary for any valid contract. The right to recall an offer until accepted is conclusive of the duty of notice. It would be worth nothing

otherwise. This duty is reasonable that the party making the offer may know that he may be looked to, and take means to protect himself against the consequences of his undertaking. He cannot know this without notice in some way. Where the act is to be simultaneously performed, the performance is, itself, notice of acceptance: where it is to be done futurely, other notice ot it must be given to show acceptance. The cases cited to us on both sides are in accord with these views. It would be an unnecessary consumption of time to go through them again. The question with respect to notice, in the case of guaranty, is this—is the writing an offer or incomplete engagement, or is it absolute? If the latter, then no notice of acceptance is required.

An absolute guaranty is one simultaneously acted upon, as in the case of goods then sold and delivered to a third party on the credit of the guaranty, or that has no element of futurity in it: the other is a proposition or offer, to become responsible, which, if not accepted and acted upon at the time as an engagement of present operation, is subject to be recalled at any time before the consideration arises which was stipulated for in it. Until recalled, it may be accepted; but notice of acceptance must be given. The simple receipt of a proposition to guaranty future credit, is not the kind of acceptance contemplated in law, otherwise no notice would be required.

The foregoing is the view substantially as taken by the Supreme Court of the United States from the case of *Russell v. Clark*, in 7th Cranch, 69, downwards, and which has been followed by a very large majority of the courts of this country. It is also recognized in *McIver v. Richardson*, I. M. & S., 557, and not impugned as is believed by any English case since that case was decided.

But in support of the view taken, we have the case of *Taylor & Co. v. McClung's Exr.* which of itself would remove any doubt we might feel. In that case, this Court speaking through the late Chief Justice said, upon a review of the cases mentioned—"These cases clearly show that the party tendering a guarantee for future and prospective credits is entitled to notice of acceptance, and the party receiving it is bound to give notice in a reasonable time after acceptance, or the party offering will not be bound by it."

We are therefore of opinion that the demurrer should be sustained, and we so adjudge and order the proper judgment to be entered.

AARON C. ENGLAND *v.* WILLIAM FORBES, ROBERT R. BANKS and JAMES MARTIN, Sheriff.

Sale of Personal Property—Fraudulent Representations of Purchaser—Rescinding Sale—Subsequent Execution Lien—Replevin.

In a sale of personal property to be paid for after delivery by note with approved security, the property and title passes to the purchaser immediately upon the delivery of the goods, and the property cannot be repossessed by the seller should the purchaser fail to give the promised note.

Where goods are sold to a person upon his false representation as to his solvency or ability to pay, the seller may rescind the contract of sale and retake the goods if they have been delivered to the buyer.

After possession has been obtained by the purchaser under a fraudulent representation as to his solvency, an execution issuing at the suit of a *bona fide* judgment creditor, having no notice or knowledge of such representation, the lien of the levy thereby made will sold good against the defrauded seller.

Mere insolvency of the buyer, well known to himself and concealed from the seller, does not, in itself, furnish sufficient ground for rescinding the contract of sale.

The fraudulent purchasing and obtaining of goods with an intention of never paying for them, will not, of itself, render the sale absolutely void, but voidable only at the election of the seller. This election cannot be used against an innocent purchaser for value or a *bona fide* execution creditor having a levy thereon.

In an action of replevin for goods sold and delivered, and the sale for proper cause afterwards being rescinded by the seller, the defendant is entitled to a verdict for the value of any goods taken, other than those received from the plaintiff in the rescinded sale.

(*New Castle, November, 1885.*)

REPLEVIN.

The plaintiff, Aaron C. England, resides and does business at Glen Mills, Delaware county, Pa. In April, 1884, Mr. Banks called upon him and talked about getting a lot of hickory spokes, and arranged for two carloads, about 21,000 spokes, agreeing to pay for the same, after their delivery, in a note with an approved endorser, after which they were to become the property of Forbes

& Banks. A few days after the delivery of the last of the spokes, Mr. England came to Wilmington, and learned that Forbes & Banks had been levied upon by the sheriff. He found their mill still going, however, and the spokes being used. He called on the firm and asked for the promised note, but they regretfully pleaded their financial difficulties and declined to comply. He learned that the judgment under which the levy was made had been entered before the arrangement with him, and that it was held by a brother of Mr. Banks, of the firm. About 4,000 of the spokes had already been used. He learned that the firm had a bad reputation, and immediately went to the coroner and replevined the goods.

Anthony Higgins and *J. H. Hoffecker, Jr.*, for plaintiff:

I. The plaintiff prays the court to instruct the jury that if they believe from all the circumstances in the case that the agreement between England and Robert R. Banks on April 11, 1884, was a conditional sale only under the terms of which the property in the spokes was not to pass to Forbes & Banks until the latter had given England a note as good as cash in payment therefor—that the plaintiff had a legal right to replevin said spoke.

II. That if the jury believe from all the circumstances in the case that the contract of April 11, 1884, was an absolute sale, but that England was induced to make said contract through the fraudulent representations of the defendant, R. R. Banks, such fraudulent representations vitiated said contract, and made said sale voidable, and that the plaintiff England had the legal right to rescind said sale and replevin his spokes.

III. That if the jury believe from all the circumstances in the case (the circumstances relied upon being,

1. Insolvency of the firm and suppression of that fact ;

2. Judgment and execution pending at the very time of the contract, April 11, 1884;

3. Giving DuBois a check about this time, when they had no funds to meet it ;

4. Falsely stating to England that their credit was good, that they could get trusted anywhere, and that they met their notes as they matured.

5. That Forbes & Banks bought the spokes intending at the time not to pay for them, that the plaintiff had the legal right to avoid said sale and replevin his spokes.

IV. That Edwin R. Banks, under whose execution James Martin, sheriff, justifies, cannot hold the property as a bonafide purchaser against the rights of the vendor, England, as the plaintiff. in the execution.

Benj. on Sales, Sec. 440, and Note (E); *Benj. on Sales*, Sec, 443; *Mears et. al. v. Waples*, 3 Houst., 581; *Alsberg Case*, U. S. C. C., Dist. of Del., 1877; *Donaldson v. Farwell*, 93 U. S. S. Ct., 631, and cases cited in note; *Stewart v. Emerson*, 52 N. H., 301; *Stewart v. Emerson*, 8 W. B. Register, 462; *Ash v. Putnam*, 1 Hill, 302; *Cary v. Samuel*, 1 Hill, 311; *Derve v. Brandt*, 53 N. Y., 466; *Naugatuck v. Babcock*, 22 Hun., 481; *Buckley v. Archer*, 21 Barb., 585; *Bussing v. Rice*, 2 Cush., 48; *Chaffee v. Fort*, 1 Lansing, 81; *Wiggin v. Day*, 9 Gray, 97; *Barnard v. Campbell*, 58 N. Y., 73; *Byrd v. Hall*, 2 Keyes, 647; *Johnson & Monell*, 2 Keyes, 655; *Noble v. Adams*, 7 Taunt., 59; *Buffington v. Ernick*, 15 Mass., 156; *Andrew v. Dieterich*, 14 Wend., 31.

Thomas Davis and *Benjamin Nields*, for defendant:

The defendants pray the court to charge the jury as follows:

1. That after delivery of the goods in pursuance of a sale, the seller cannot rescind the contract or reclaim the goods on the ground of fraud without proving deceptive assertions, or false representations in some form or other, fraudulently made to induce him to part with his property. Mere insolvency of the buyer, though well known to himself and concealed from the seller, does not in itself furnish sufficient ground for recinding a contract of sale.

3 Houston, 621; *Noble v. Adams*, 7 Taunton, 259; *Hilliard on Sales*, 307.

2. That an intention to deceive, and a false statement even, on a material point, will not overthrow the bargain, unless the statement was the means which produced the bargain and the onus is on the plaintiff to prove that the plaintiff acted on the faith of the false representation.

30 Penna. State Reports, 401; *2 Chilly on Pleadings*, (16 Am. ed.), 519; *2 Parsons on Contracts*, 267.

3. If the plaintiff chose to act on his own judgment with

full knowledge or means of knowledge of the facts he cannot be heard to say he was deceived by the defendant's representations respecting them.

Allwood v. Small, 6 Clark & Finnally (Am. ed.), 233.

4. That in the absence of any stipulation to the contrary the fair presumption is that the vendor, by delivering the goods before the condition is performed, waives the condition and trusts to the responsibility of his vendor.

4 Houston, 79; *Alderdice et. al. v. Truss et. al.*, 2 Houston, 268.

5. That if the jury should believe from the evidence that part of the spokes was the property of the plaintiff and part thereof was the property of the defendant, that the plaintiff is entitled to nominal damages for the unlawful detention of his property and that the defendants must have a verdict for the value of such of the spokes as are found not to be the plaintiff's property and damages for the taking of them on the writ.

Powell v. Hensdale, 5 Mass., 342; *Clarly v. Adair*, 3 Harr., 113.

COMEGYS, C. J., charging the jury:

Wherever there is a sale of personal property, where nothing remains to be done by the seller before it is delivered, the property passes to the buyer without delivery; and if injured or destroyed after the sale, the loss falls upon the purchaser, and the seller is entitled to payment of the price.

The right of property and the right of possession are distinct. The former may be in one person, and the latter in another. A seller may have a qualified right to retain the goods sold until payment is made, and yet the property in the goods may be in the purchaser.

Where there is an immediate sale, and nothing remains to be done by the seller as between him and the buyer, the property in the thing sold vests in the buyer, and all the consequences resulting from the vesting follow.

When there is a sale of goods generally, no property in them passes until delivery, because until then the very goods sold are not ascertained; but when, by the contract itself, the seller sets

apart, or appropriates to the vendee, a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after delivery of goods in pursuance of a general contract. The appropriation of the chattel is the same as delivery by the seller, and the assent of the buyer to take the specific chattel and pay the price is equivalent to his accepting possession.

Where there is a sale of personal property to be paid for in cash, the property in the things sold passes to the buyer, but the seller has the right to re-possession until the money is paid: this is because of his lien for the purchase money. But if he deliver the possession to the buyer without such payment, his lien is gone and the title of the buyer is complete. His remedy is an action on the contract of sale.

So where goods are sold to be paid for on credit, whether generally, or upon notes, bills, bonds, or the like, to be given, and they are deliverd to the buyer upon such general credit, or before the security is given, where it is stipulated for, the property and title to them against the seller is complete: his remedy is on the agreement, or by reason of it.

Where goods are sold to a person upon a false representation as to his solvency or ability to pay, and it does not appear from the evidence, either directly, or by reasonable inference, that the sale was made in whole or in part, under the influence of such representation, the seller cannot rescind the contract of sale on the ground of false representation, and retake the goods if they have been delivered to the buyer. But if the sale were made by reason of such representation, it may be avoided, and the goods, if they have been delivered, retaken from the custody of the buyer.

He may likewise refuse to deliver the goods bought, where they have not been delivered, upon the same ground. The reason is, because the fraudulent representation, in virtue of which the contract of sale was made, vitiated such contract and made it voidable, at the option of the seller.

But if in the case of such vitiated contract of sale, the goods sold have been delivered to the buyer, who sells them to another who buys them *bona fide*, without any notice or knowledge on his part of the fraudulent feature of the sale, such innocent purchaser

acquires a valid title to them, which cannot be defeated by the original seller. Likewise, where, after possession has been obtained by a party who purchases under a fraudulent representation as to his solvency, they be levied upon by an execution issued at the suit of a *bona fide* judgment creditor, having no notice or knowledge of any such representation, his execution lien cannot be disturbed by, but will hold good against, the defrauded seller.

It is the law of this State, as decided in the case of *Mears & Son v. Waples*, that mere insolvency of the buyer, well known to himself and concealed from the seller, does not in itself furnish sufficient grounds for recinding a contract of sale. Nor will the fraudulent purchasing and obtaining of goods with an intention of never paying for them, of itself render the contract of sale absolutely void, even as between the seller and buyer; yet it will render it voidable at the election of the seller, but if the goods are sold by such fraudulent buyer to an innocent purchaser for value, the latter will take and hold them by a valid title. 3 Houst., 321; 4 Houst., 62.

In order to entitle the plaintiff to recover at all, you must be satisfied from the proof in the cause, of two things—1st, that he made the sale to Forbes & Banks upon or by reason of a false representation made at the time of their financial condition; in determining this, you must take the evidence given you by the defendant, Banks, as well as that of the plaintiff, and the evidence also of the actual condition of Forbes & Banks; and 2d, that the execution of Edwin R. Banks was issued upon a judgment entered on a bond made fraudulently, and not *bona fide*.

In any event, if the plaintiff with his replevin took any property other than the spokes shipped by him, the defendants are entitled to a verdict for their value, although you may decide to give the plaintiff a verdict for the value of the spokes remaining at the time the sheriff served the replevin.

Verdict for plaintiff.

WILLIAM H. PIERSON and GEORGE W. PIERSON, trading as PIERSON BROS., for the use of WILLIAM H. PIERSON *v.* SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, a Corporation existing under the Laws of Massachusetts.

Demurrer—Defect in Pleadings.

A demurrer in whatever stage of the pleadings it is taken reaches back in its effect through the whole record, and in general attaches ultimately upon the first substantial defect in the pleadings on whatever side it may have occurred—defects in substance not being aided by the adverse party's pleading over, as formal defects are.

The express conditions set forth in a policy of insurance are conditions precedent to the commencement of an action thereon by the plaintiff. The cause of action is not complete without showing performance of all the conditions on the part of plaintiff, or matter in excuse. By the terms of the policy, action was postponed until the expiration of sixty days after due notice of the fire and satisfactory proofs of the loss were received at the office of the company. There being no averment in the narr that such notice and proofs were given and furnished by the plaintiffs to the defendants at the place specified sixty days before the suit was brought, the declaration is therein defective in substance and judgment will be given for the defendant.

(*New Castle, November, 1885.*)

ACTION OF ASSUMPSIT upon a policy of insurance for loss by fire of certain property which was insured against the same by the defendant company.

The narr contained two counts, one stating the substance and effect of the policy of insurances, and the other setting out the policy in *haec verbis*.

The defendant pleaded specially and the plaintiff joined issue on several pleas and demurred to the other pleas. The case is before the court on the demurrer. The facts sufficiently appear in the opinion.

Benjamin Nields, for the plaintiff.

Edward G. Bradford and *Lewis C. Vandegrift*, for the defendant.

COMEGYS, C. J.: The counsel for the defendant having offered for consideration and insisted upon the rule—that in the case of a general demurrer to a subsequent pleading, the court will go back

and examine the whole record and give judgment against that party who has committed the first fault in the substantial pleading, we are to examine the declaration and determine upon its sufficiency in substance, the same as if it had been demurred to for insufficiency. "A demurrer in whatever stage of the pleadings it is taken, reaches back in its effect through the *whole* record, and in general attaches ultimately upon the first substantial defect in the pleadings on whichever side it may have occurred—defects in *substance* not being aided by the adverse party's mere pleading over, as formal defects are." "Hence, though the parties join in demurrer upon any one particular point, in any stage of the pleadings, judgment must, nevertheless, be given upon the *whole* record, and, regularly, against that party in whose pleading the first *substantial* defect has occurred. Thus, if the declaration is ill, in substance—the plea in bar frivolous—and demurrer joined on the *plea*, judgment must be for the *defendant*. For, though the issue in law is joined immediately and in terms on the *plea only*, and though that is worthless, yet a bad plea is sufficient for a *bad declaration*. *Gould's Pl.*, 474, 475, Secs. 36 and 37 of Chap. IX, and the cases there cited.

We are therefore to examine the declaration in this case, as the first pleading, and decide whether it is sufficient in substance to support the action brought—which is assumpsit.

There are two counts in the narr, one declaring upon the policy of insurance sued upon, according to its supposed legal effect. The other or second, sets out the policy in *haec verba*. Are these counts respectively, or is either of them sufficient in law for the above purpose? That is the question. To solve this question satisfactorily, it is necessary to determine what the true intent and meaning and undertaking of the policy are, as shown by it. This will fix its legal effect and proper construction.

Without undertaking to use the very language, or pursue the order, of the provisions of the policy, it may be taken to be a promise on the part of the defendant, in consideration of the money paid by the plaintiffs to insure to the amount of thirty-five hundred dollars, a stock of goods consisting of certain building material of wood, known as mill-work, contained in the building mentioned in the counts, for a term commencing on the 14th day of January, 1880, at twelve o'clock noon and ending with the same day 1881,

against all such immediate loss or damage sustained by the plaintiffs and their legal representatives as might occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as therein provided, other than loss by theft at or after the fire—loss occasioned by invasion, insurrection, riot, civil commotion, military or usurped power—by lightning or explosions of any kind unless fire ensued and then for the loss or damage by fire only—by loss or damage caused by removal of the property from a building where there is no loss by fire, unless such removal was necessary to preserve the property, in which case the damage was to be borne by both parties in proportion as the whole sum insured bore to the whole value of the property insured—nor for loss or damage caused by neglect to use all practicable means to save and preserve the property from damage at and after the fire—*to be paid to the plaintiffs sixty days after due notice, and satisfactory proofs of the loss or damage made by the plaintiffs are received at the office of the Company in Springfield;* upon condition that in case of loss, the plaintiffs should give immediate notice thereof, and render to the company a particular account under oath of the loss, stating the time, origin and circumstances of the fire, the occupancy of the building containing the property insured, other insurance upon the same, if any, and copies of all policies; the whole value and ownership of the property; and the amount of the loss or damage; and also should produce the certificate under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire and not concerned in the loss, or related to the plaintiffs, that he has examined the circumstances attending the loss, knows the character and circumstances of the plaintiffs, and verily believes that they have, without fraud, sustained loss on the property insured to the amount claimed. There are other conditions, or provisions in the policy which affect the plaintiff's right of recovery; but as they do not interfere with his right to sue in the first instance, they need not now be referred to.

What are above stated as conditions affecting the liability of the defendant under the policy, are, with all other stipulations therein, expressly made such by the terms of the policy as set forth in the second count. The right of action, therefore, depended upon the performance of such conditions by the defendant, or of his being

able to render a valid excuse for non-performance. They are therefore conditions precedent to the commencement of an action by the plaintiffs. The cause of action is not complete without showing performance, or matter in excuse.

By the averment next the last in the first count, there is a sufficient allegation that the plaintiff complied with, strictly, all those condition—thus, *prima facie*, entitling himself to an action. Such action, however, could not be brought immediately thereupon; but, by the terms of the policy, was postponed until the expiration of sixty days after due notice of the fire, and satisfactory proofs of the loss or damage were received at the office of the company at Springfield. The defendant, therefore, had sixty days after notice of the fire and satisfactory proofs of the loss or damage given and made by the plaintiff's, were received at Springfield, in which to pay for such loss or damage. There is, nowhere in the narr, an averment that such notice and proofs were given and furnished by the plaintiffs to the defendant at Springfield, or received by it there from him. As the right to sue could not arise until sixty days after such event or transaction, it follows that the plaintiff's do not show by the declation they had a right of action against the defendant. The defect is one of substance, and not of mere form; and therefore is fatal as against the present suit. The fact omitted to be averred is material to recovery in the suit; and being so, it was necessary that it should be set forth in the narr, like all other material facts, and proved also. The distinction between form and substance in pleadings is stated as follows in Sec. 17 of Chapter IX of Gould's Pleading before referred to. "The difference between matter of form and matter of substance, in general, under the statute of Elizabeth, as laid down by Lord Hobak, is that, *that* without which the *right* doth sufficiently appear to the court is *form*, but that any defect by reason whereof the *right appears not*, is a defect in *substance*." In the next section, giving his own defidition, the author says—"if the *matter* pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is *substantial*, but, if the only fault is in the form of alleging it, the defect is but *formal*." He then proceeds to give examples of both classes. In this case the matter pleaded (that is, what appears by the declaration) is insufficient—in that it is not averred that due notice of the

fire and satisfactory proofs of the loss or damage sustained by the plaintiff were received at the office at Springfield sixty days before the suit was brought. The judgment in this case must therefore be for the defendant.

HOUSTON, J.:

There are two counts in the narr on the policy of insurance, which is in writing, but not under seal by the company, if it has any, and consequently the action is properly in assumpsit, and which is apparent to us upon the record.

The first of these counts sets forth the policy according to its substance, the second in the words in which it was written and printed in the usual form of its policies of insurance, to the first of which no less than fourteen special pleas have been filed, and about the same number, and substantially the same special pleas have been filed to the second count. The first plea to each, however, consists of the general issue of *non assumpsit* in the action, while the second plea to each of them is in brief as follows:

Secondly, That the plaintiff did not give immediate notice of the said loss by fire to the said defendant in manner and form as he had alleged in said count;

Thirdly, That he did not give immediate notice to the said defendant of the said loss by fire and render to said defendant a particular account thereof in manner and form as he had alleged in said counts, except to the second count it adds that he did not render such particular account under oath, etc.;

The fourth plea is to the first count only, and denies merely that the said George W. Pierson, his brother and formerly his partner in the business, transferred to the plaintiff and his assigns all his right and interest in the policy of insurance, and all benefit and advantage to be derived therefrom in manner and form as alleged by him in said first count;

And fifthly (and which plea is also to the first count only), that the plaintiff did not become entitled to the benefit and advantage to be derived from the policy of insurance in the first count mentioned in manner and form as alleged by him in that count. All these pleas to both of the counts have been traversed by the

plaintiff in his replication and issue is joined on each of them respectively.

But to the sixth plea to the first and to the fourth plea to the second count, which are substantially the same, and allege that in the said policy of insurance it was provided that any attempt at fraud on the part of the assured, should cause a forfeiture of all claim under the policy, and that the plaintiff being the assured under it, after the said fire had occurred and before the commencement of this action, did make an attempt at fraud upon the defendant, touching and concerning the said loss by fire, to wit.: On the 7th day of September, 1882, at New Castle County he was required by the defendant to produce for examination by the said defendant, certain books of account of the said plaintiff relating to the business of said plaintiff in order that the said defendant might ascertain the amount and cash value at the time of said fire of the goods, merchandise and effects of the said plaintiff burnt up, consumed and destroyed thereby, and being so required, the plaintiff did then and there wilfully and fraudulently neglect and omit to produce said books of account for examination as aforesaid with the intent on the part of the plaintiff to cause the defendant to believe that the amount and cash value, at the time of said fire of the said goods so burnt up and destroyed as aforesaid, were greater than in truth and fact they were and to deceive, injure and defraud the defendant in the premises, although the plaintiff when so required was able to produce said books of account for examination as aforesaid, the plaintiff has demurred and has in substance and in effect assigned the following causes therefor, viz:—that the said pleas do not allege that the said books of accounts mentioned in them in any manner related to the said property destroyed by said fire, nor to the business of said plaintiff connected therewith; nor do they allege that the said books contained any statement or items showing the amount and cash value at the time of the said fire, of the goods, merchandise and effects of the said plaintiff, so burnt, consumed and destroyed thereby; nor do they allege what the amount and cash value at the time of said fire of the goods, merchandise and effects of the said plaintiff burnt up, consumed and destroyed thereby actually were; nor do they allege that the said plaintiff was required to submit to an examination under oath by

any person appointed by the defendant, and produce his books of account and other vouchers; nor do they allege that the defendant required the plaintiff to produce books of account relating to the said plaintiff's claim.

But the policy expressly stipulates "that in case of loss, the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin and circumstances of the fire; the occupancy of the building insured or containing the property insured; other insurance, if any, and copies of all policies; the whole value and ownership of the property; and the amount of loss or damage; and shall produce the certificate, under seal of a magistrate, notary public, or commissioner of deeds, nearest the place of the fire; and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to, or cash value of the property at the time of the fire, nor shall the insured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby assured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers, assignors, unless the assignee owns the property, must make the proof hereby required. If required, the assured shall produce books of account and other proper vouchers original or duplicate invoices, and all property hereby insured, whether damaged or not damaged; and be examined under oath by any person appointed by the company touching all questions by him deemed pertinent to the loss, and subscribe such examination when reduced to writing; and a refusal to answer such questions and subscribe such examination when reduced to writing shall cause a forfeiture of all claims under this policy." And although the last clause but one of it stipulates that if required, the assured shall produce books of accounts (on which alone, and in the very words of it), the breach of it by the plaintiff is alleged by the defendant in the two pleas demurred to by the

plaintiff for the reasons before stated, it is apparent I think, from the immediate context, as well from every other clause contained in the whole extract that the meaning and intendment of it was, that books of account relating to the property insured and the business connected therewith were the only books of accounts, the production of which could be required under it, for it would be unreasonable for us to interpret it, as we find it either in the policy or in the pleas, to mean any book or books of account which had no relation whatever to the property insured or the business connected with it. As such a thing would have been utterly useless at any time and under any circumstances, it could never have been intended or contemplated by either of the parties to the agreement, and it was therefore unnecessary for the defendant to allege in either of these pleas that the said books of account required to be produced as stated in them, in any manner related to the said property destroyed by said fire, or to the business of said plaintiff connected therewith, as such was clearly the import and meaning of the terms employed in the policy in regard to that matter wherever it is referred to in it, and the breach of that particular stipulation by the plaintiff is alleged in the very words of it, as I have before said, in the pleas; and if there could be no question or uncertainty as to the meaning of that stipulation on the face of the policy itself, it was as clearly sufficient to allege the breach of it simply in the words of it, as was done in this case.

And as this is the only stipulation in the policy of which any breach by the plaintiff is alleged in either of these pleas, I also consider all the other causes assigned by the plaintiff in support of his demurrers to them, equally insufficient. That it was not necessary for the defendant to allege in them that the said books of account required to be produced as averred in them, contained any statement or items showing the amount and cash value, at the time of the said fire, of the goods, merchandise and effects of the said plaintiff, so burnt, consumed and destroyed thereby. For with the interpretation which I have given to the stipulation and to the simple and direct breach in the words of it, as alleged in the pleas, no such, and no further allegation was necessary to constitute it a good plea of defense on that ground, because the agreement in that respect on that part of the plaintiff was positive and express, and

without any qualification, that he would produce his books of accounts relating to the property insured in his business connected with it, if required, and which rendered the actual production of them necessary as a condition precedent to the commencement of the action by the plaintiff. Nor were any of the other allegations set forth in the remaining causes of demurrer assigned by the plaintiff, necessary for the reasons already stated, as they all proceed on the same erroneous assumption that the pleas in question imported that the defendant had required the production of books of account by the plaintiff, which did not relate or pertain to the property insured or his business connected therewith, and as the meaning and construction of the terms referred to in the policy and literally repeated in the pleas, are to be ascertained and determined by the court, I accordingly think that the demurrer of the plaintiff to the sixth plea of the defendant to the first count in the declaration, and to the fourth plea to the second count in it, are insufficient, and should therefore be overruled by the court.

The seventh plea to the first, and the fifth plea to the second count, are also substantially the same, and are in brief as follows :— that after the said fire had occurred, and before the commencement of the action, the plaintiff made an attempt at fraud upon the defendant, touching and concerning the said loss by fire in the said counts mentioned, in that the plaintiff did in and by his statement under oath, in said counts mentioned, of the amount of loss, or damage by said fire, knowingly, wilfully and fraudulently state that the amount of the said loss on the said goods and effects burnt up, consumed and destroyed by the said fire according to the cash value thereof at the time of said loss, was the sum of twelve thousand eight hundred and ninety-nine dollars and twenty-one cents, with the intent on his part to cause the defendant to believe that the cash value at the time of said loss, of said goods and effects, so burnt up, consumed and destroyed, was greater than in truth and fact it was, and to deceive, injure and defraud the defendant in the premises, although the cash value thereof at the time of said loss was, and was by the plaintiff at the time of making his said statement under oath well known to be a much smaller sum of money than the sum of money aforesaid, to wit.:—the sum of five thousand dollars.

To these two pleas the plaintiff has also demurred and assigned the following causes therefor in substance: That although it is alleged by the defendant in said pleas that the said misrepresentation of the said loss or damage by said fire was made by the plaintiff with the intent to cause the defendant to pay to him a much larger sum than the actual amount of the loss sustained by him in the destruction of said goods by said fire, they do not allege that said statement was made with the intent to cause the said defendant to pay to the said plaintiff a larger sum than is claimed on said policy, to wit. :—The sum of thirty-five hundred dollars; nor do they allege how or in what manner the said defendant was, or could be harmed or injured by the alleged statement.

The stipulations in the policy on which the defense of these two pleas is predicted are, *first*, that which requires the assured in case of loss to give immediate notice thereof, and to render to the company a particular account of said loss, under oath, stating among other things specified, "The whole value and ownership of the property; and the amount of loss or damage;" *secondly*, to "produce the certificate under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud, sustained loss on the property insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to, or cash value of, the property at the time of the fire, nor shall the insured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby assured bears to the whole sum insured on said property," etc., and *thirdly*, "any fraud, or attempt at fraud, or any false swearing on the part of the assured shall cause a forfeiture of all claim under this policy."

These stipulations constitute parts of the express agreement entered into with the company by every person who obtains a policy of insurance of this kind from it on his property, and when the breach of any of them by the plaintiff is pleaded as a legal defense to an action by him against the company on such a policy of insurance, if the fact of the breaches alleged is admitted, or is not traversed

or denied before the court upon the record, it would seem to be by the consent and agreement of the assured embodied in the contract between the parties, a legal defense to the action. But these two pleas aver that the alleged false statement by the plaintiff under oath that the amount of the loss or damage by said fire was twelve thousand eight hundred and ninety-nine dollars and twenty-one cents, when it was in fact of a much smaller amount, to wit.:—the sum of five thousand dollars, was knowingly and wilfully so made by him with the intent to cause the defendant to believe that the said loss was much greater than in truth and fact it was, and to deceive, injure and defraud the defendant in the premises; and the further meaning of which is that it was an attempt at fraud and a false swearing on the part of the plaintiff which caused a forfeiture of all his claim under the policy. And this allegation of the intent on the part of the plaintiff thus to defraud the defendant in the premises, in itself considered, as much an allegation of a fact in the pleas, as that of any other fact alleged in them, as that he made the alleged statement itself, or made it under oath, and that it is an allegation of a fact in the pleas is only the more obvious when we consider that was this intent alone, if it existed, that constituted the alleged act an attempt at fraud on part of the plaintiff in the premises. If the plaintiff had traversed these pleas the allegation that the statement was wilfully and falsely made by him with the intent to defraud the defendant, it would have been the allegation of a material fact in the case, to be submitted to and found by the jury in order to sustain these pleas. But the plaintiff has demurred to them, and by the causes assigned for it evidently expects the court to infer that there could not have been such an intent on the part of the plaintiff, and that the defendant could not have been harmed or injured by the alleged statement, inasmuch as it appears from the pleas themselves that the alleged loss actually sustained five thousand dollars, was a larger sum than is secured by, or can be claimed on the policy, to wit.: — the sum of thirty-five hundred dollars; without denying, however, except indirectly and inferentially, as I have before stated, the allegation in the pleas that the said statement was so made by the plaintiff with the intent to defraud the defendant. It is neither a demurrer or plea properly considered I think, inasmuch as it neither admits or directly denies

the pleas, and it is too uncertain and equivocal to be sustained as a sufficient answer by way of demurrer to the pleas in question, and should therefore be overruled by the court.

And I also consider the demurrers to the eighth plea to the first, and to the sixth plea to the second count which are substantially the same, are insufficient. The main allegation in each of them simply is that the plaintiff did wilfully and falsely swear in said statement that the amount of the said loss on said goods was the sum of twelve thousand and eight hundred and ninety-nine dollars and twenty-one cents, although the cash value of all said goods so burnt, consumed and destroyed, was at the time of said loss, and was well known to the plaintiff at the time of making the said statement under oath, to be a much smaller sum of money than the sum aforesaid, to wit:—the sum of five thousand dollars; and essentially differing only from the two preceding pleas in the omission to allege that it was done with the intent to defraud the defendant, or with any other intent or qualification whatever. And yet with this fact thus alleged in each of these pleas the plaintiff has demurred to them, and assigned for causes of it that the pleas do not allege that said statement was made with the intent to cause the defendant to pay to the plaintiff a larger sum than is claimed on said policy, to wit:—the sum of thirty-five hundred dollars; nor do they allege how or in what manner the said defendant was, or could be harmed or injured by the alleged statement. But it was obviously and utterly unnecessary that the pleas should contain either of these allegations, or any other allegation than we find in them to constitute each of them as they stand, if the fact alleged in them be admitted, or if on a traverse of them hereafter under the recent statute, it should be proved on a trial of the case before a jury, a good and complete defence to the action. For in my opinion, if it was a fact, as alleged in the pleas, that the plaintiff wilfully, knowingly and falsely swore that the amount of the loss on the said goods so burnt and destroyed by the said fire was twelve thousand eight hundred and ninety-nine dollars and twenty-one cents, when in truth and in fact it was much less, to wit: five thousand dollars—it was a direct breach of the stipulation in the policy, that in case of a loss, he should give immediate notice thereof, and should give to the company a particular account of said

loss, under oath, stating among things specifically mentioned in connection with it, "the whole value and ownership of the property, and the amount of loss or damage;" and also a direct breach of the further stipulation in the policy, that "any fraud, or attempt at fraud, or any false swearing on the part of the assured shall cause a forfeiture of all claim under this policy." And of all the obligations expressly assumed by the plaintiff on entering into this contract of insurance by accepting this policy, there was none more solemn nor stringent than this, perhaps; but this agreement on the part of the plaintiff not to swear falsely to that, or any other specific statement of fact required to be made under oath upon the penalty or forfeiture of all claim under the policy, is a distinct and substantive stipulation in itself independent of all other specific stipulations contained in the policy, and although it may be impossible to conceive that any such false statement could have been wilfully and knowingly made by him under oath with an entirely innocent, honest or harmless intention towards the defendant, it requires no other allegation of intent on the part of the plaintiff in these two pleas to constitute it a clear violation and breach of that particular stipulation, than that he intentionally swore falsely to the amount of the loss, as is substantially alleged in them. But is not this allegation of a materal and substantial fact in the pleas, and a good defence to the action, if the allegation be true, admitted by the demurrer, which instead of denying it, assigns for cause that they do not allege that the said statement was made with the intent to cause the said defendant to pay to the said plaintiff a larger sum than is claimed on said policy, to wit:—the sum of thirty-five hundred dollars; nor do they allege how, or in what manner the said defendant was, or could be harmed or injured by the alleged statement. That is to say, because it appeared from the pleas themselves that the loss was at least as much as five thousand dollars; and all of which by necessary implication, if not expressly, admits that the said statement so made by the plaintiff under oath, was false in that particular, and was well known to him to be false when he so made and swore to it? The demurrer is not for matter of form, but matter of substance, although special causes are assigned for it, and neither of them is sufficient to support it. Such is my opinion, and I therefore think that the demurrers to the

eighth plea to the first, and to the sixth plea to the second count should also be overruled by the court.

The ninth, tenth and eleventh pleas to the first count, and the seventh, eighth and ninth pleas to the second count, which are substantially the same, are traversed in the replication, and issue is joined on each of them.

The twelfth plea to the first, and the tenth plea to the second count, which are substantially the same, allege that before the commencement of the action the plaintiff made certain false entries in his books of account relating to the business of the said plaintiff, with the intent to deceive the said defendant as to the amount and value of the said goods burnt up, consumed and destroyed by the said fire, and to injure and defraud the defendant in the premises; to each of which pleas the plaintiff has demurred and assigned the following causes therefor;—because they do not allege what entries were made by the plaintiff in said books of account, with the date or dates thereof, nor wherein said alleged entries were false; nor do they allege that said books of account in any manner related to the said property destroyed by the said fire, or to the business of the said plaintiff connected therewith.

I consider that in pleas of fraud of this kind the allegations contained in them were sufficient to constitute a good plea in a case of this character without either of the additional allegations suggested in the first cause of demurrer assigned, and also without either of the additional allegations suggested in the second cause of demurrer assigned, for the reason before stated by me when considering a similar objection in the demurrers to.

I therefore think that the demurrers to the twelfth plea to the first, and to the tenth plea to the second count, should also be overruled.

But I think the demurrer of the defendant to the replication of the plaintiff to the thirteenth plea of the defendant should be sustained on the grounds assigned for it in the causes of demurrer, and because the replication in effect denies that the defendant has put a proper construction in and by his said plea on the word "immediately" in the phraseology of the said policy of insurance wherein it provides as one of the conditions thereof "that the assured in case of loss by fire, should immediately thereafter render

to said defendant a particular account thereof, etc., as alleged in said plea, and the plaintiff thereby seeks to raise as a question of fact on the said replication, a question of legal construction purely to be determined by the court on the meaning of the word immediately when it occurs in such connection in a policy of insurance and in a case like this; and that judgment should therefore be rendered for the defendant on this demurrer.

And I think that the demurrer of the defendant to the replication of the plaintiff to the fourteenth plea to the first count in the declaration is not sustainable, for as I have before said I have no doubt that the provision of the policy on which that plea is based has reference only to such books of account of the plaintiff as had relation to the goods and property covered by the policy of insurance, and to the business of the plaintiff connected therewith. The language of it, as well as the reason of the thing clearly imports this I think. It is in these words: "If required, the assured shall produce books of account and other proper vouchers, original or duplicate invoices, and all property hereby insured, whether damaged or not damaged," etc. The connection in which the words *books of account* occur in this sentence clearly indicate and imply such books of account only as related like the "other proper vouchers," original or duplicate invoices, "to the property thereby insured, or to the business of the plaintiff connected therewith." And such must have been the meaning of the words in question according to the understanding and intention of both of the parties to the policy of insurance, because it would be utterly unreasonable to suppose that it could have been within the intendment of the parties that books of accounts having no relation to the property thereby insured, or no relation to the business of the plaintiff connected with it, would ever be required to be produced under this or any other provision of the policy. But under the generality of these words when taken without the context and the slight ambiguity which is only so made to appear in the meaning of them, the only breach of that condition in the policy alleged in the plea, is limited to them exclusively, for it singularly omits to allege any breach of the context, or to allege that the plaintiff was at the same time required to produce other proper vouchers, "original or duplicate invoices, and all property thereby insured whether damaged or not

damaged," or that the plaintiff then and there refused and omitted to produce them. And as the plea thus seeks to take advantage of this slight ambiguity arising from the generality of the words "books of account," when read or considered without the context, as a defence to the action, I think the plainntiff was warranted by the character and design of the plea in replying to it specially, instead of traversing it and taking issue upon it. But for the reasons already stated, I think the plea itself is as defective and demurrable, as the replication to it, and even more so; as, however, there is no demurrer to the plea, and I am now only considering *seriatim* the several demurrers in the order in which they are presented in the record of the case, and the plea and replication are alike defective. I will here merely say, that I am of the opinion that the demurrer to the replication now under consideration should be overruled.

The demurrer of the defendant to the replication of the plaintiff to the fifteenth plea to the first count of the declaration, is good in my opinion and should be sustained, because the replication in effect substantially traverses and denies the whole plea, and which it should have done in form as well as effect, instead of replying to it specially and in a double manner, as we find it. I therefore think that judgment should be rendered for the defendant on this demurrer.

And for the reasons before stated I think the demurrer of the plaintiff to the fourth plea of the defendant to the second count of the declaration, is not sustainable and should therefore be overruled.

And for the reasons before stated I also think the demurrer of the plaintiff to the fifth plea of the defendant to the second count of the declaration should be overruled. And also that the demurrer of the plaintiff to the sixth plea to the second count of the declaration should be overruled.

And for reasons before stated my opinion also is that the demurrer of the plaintiff to the tenth plea to the second count of the declaration should be overruled.

And for the reasons before stated I consider the demurrer of the defendant to the replication of the plaintiff to the eleventh plea to the second count of the declaration should also be overruled.

But I consider the demurrer of the defendant to the replica-

tion of the plaintiff to the twelfth plea to the second count of the declaration sufficient, and that judgment should be thereupon entered for the defendant. And also that the demurrer of the defendant to the replication of the plaintiff to the thirteenth plea to the second count, is sufficent and should be sustained by the court.

But relying on the well settled rule of pleading that a demurrer, in whatever stage of the pleadings it is taken, reaches back in its effect through the whole record, and in general attaches ultimately upon the first substantial defect in the pleadings, on which ever side it may have occurred—defects in substance not being aided by the adverse party's pleading over, as defects in form rarely are. Hence though the parties join in demurrer upon any one particular point in any stage of the pleadings, judgment must nevertheless be given upon the whole record, and regularly against that party in whose pleadings the first substantial fault has occurred. *Gould's Pl.*, Chap. 9, Secs. 36, 37. The counsel for the defendant further contend that certain substantial defects specified by them occur in the declaration of the plaintiff, either of which is sufficient under that rule to entitle the defendant to judgment against the plaintiff on any one of the demurrers joined in issue by the parties in the case, and that both special counts in the narr are faulty in substance for the reasons assigned, viz.:

1. The first count states that the insurance money was to be paid sixty days after the notice and satisfactory proofs of the same made by the assured were received at the office of said defendant in Springfield. But there is no allegation either that such proofs were received at Springfield sixty days before the bringing of the suit, or ever were received there.

Was such an allegation necessary in that count after alleging, as it does, that the plaintiff gave immediate notice of the said loss by fire, and render to said defendant a particular account of said loss under oath, with the certificate under the seal of the notary public nearest the place of the fire, in full and complete compliance in every particular as required by the condition of the said policy of insurance? I cannot think that it was, and the fact that it is further alleged by the plaintiff on the record that he did not refuse or omit to produce on the requisition of the defendant for its examination, his books of accounts relating to the property insured

and his business connected therewith, but adds to the conclusion of my mind that such an allegation was not necessary in that count. For so much being alleged to have been done by the plaintiff in accordance with the conditions and requirements of the policy, to supply the specified proofs of the loss by the fire, and not being satisfactory to the defendant, we must, I think, consider that it now properly becomes a question to be determined in the trial of this action, whether the proofs so submitted and received at Springfield were sufficient within the true meaning and intendment of the agreement between the parties, unless we are prepared to hold that the proper constructions of this somewhat remarkable clause in the policy confers upon the defendant, by the intendment of both of the parties, the sole and exclusive right and the absolute power of determining the question when the proof of the loss should be satisfactory to the company.

2. The second count it is objected is fatally defective upon the the same ground and in regard to which my opinion of course, is the same as on the first objection.

3. The first count it is next objected nowhere states the defendant's promise after the loss to pay any moneys.

But was that necessary, inasmuch as it alleged in the count the said company, a corporation existing under the laws of the State of Massachusetts, was summoned to answer the plaintiff of a plea of trespass on the case, upon promises and thereupon the plaintiff by Benjamin Nields, his attorney, complains: For that, whereas, heretofore, to wit: — on the fourteenth day of January, A. D. eighteen hundred and eighty, at the county aforesaid, a certain policy of insurance was then and there made and entered into and signed by the President and Secretary of the said corporation defendant, and countersigned by James Wooley, agent at Wilmington in the State aforesaid, and the same was then and there delivered by the said defendant unto William H. Pierson and George W. Pierson, trading as Pierson Bros., under and by which said policy it was agreed as follows:—That the said defendant in and by said policy of insurance, in consideration of the receipt of thirty-five dollars to them paid by said Pierson Bros., did insure the said Pierson Bros. against loss or damage by fire to the amount of thirty-five hundred dollars, for the term of one year on their stock of

goods "therein mentioned, and with the further description, terms, limitations, stipulations and conditions in said policy contained and in said count substantially alleged in the form and manner usual in such cases. In this the count expressly alleges the action to be in assumpsit on the case, upon promises and a policy of insurance in writing, but without seal, made and delivered by the defendant corporation to the assured for the consideration mentioned, and then and there paid to it for the first year, and twice afterwards on the renewal of it on each of the two succeeding years. The import of the allegation in the count, therefore, is that the said defendant in and by the said policy of insurance, in consideration of the receipt of the said thirty-five dollars to them paid by said Pierson Bros., agreed to insure them against loss or damage by fire to the amount of thirty-five hundred dollars, for the term of one year on their said stock of goods and property therein described and more set forth. And we have the authority of Mr. Chitty, and the case cited by him, that this word *agreed* in a declaratian in assumpsit is equivalent to the word promised, for he says a declaration in assumpsit should in all cases show that a promise has been made, either by expressly avering that the defendant "promised," or by other equivalent words, and afterwards adds that the word "agreed" is held to be an equivalent word. 1 Ch. Pl., 308. And this was the promise made in this case on which the action was founded and was the only promise to be alleged or proved in it to support it, so far as any promise could be needed for that purpose in an action of assumpsit on a written agreement or contract, as this was. This promise, however, was not only in writing, but was a conditional promise wholly dependent upon a future accident or contingency which might never happen, in which event the defendant had to pay nothing, notwithstanding the consideration received, and which as an actionable promise could have no force or effect whatever in law, until the future accident or contingency should occur, but the instant it occurred became unconditional, absolute and complete in its legal force and effect by the terms of the contract itself, and therefore no promise after that could be required or need be alleged in the declaration to give legal validity to it, or to maintain an action of assumpsit upon it. And what I have just said will also

apply to all the objections of the defendant following the 3d down to, and including, the 4th.

5. The fifth objection of the defendant that the policy set out in the second count is not stated to have been countersigned by the duly authorized agent of the defendant at Wilmington, but I think that allegation sufficiently appears in the count.

6. The sixth and last objection is to the second count also, and which is that it is fatally defective in that no proper breach is laid or alleged in it, because the contract to be performed by the defendant was in the alternative, viz: Either to repair, restore, or replace the property, or to pay the loss or damage. And that the loss was not compulsorily payable until the lapse of sixty days after satisfactory proof thereof. But the policy contemplates that alternative performance may be entered upon within this time, viz: upon or after notice within thirty days after the receipt of proofs of loss. Where a contract is in the alternative, the breach must be laid accordingly. 1 Ch. Pl., 334. This is a case of alternative promises. *Leake on Contracts*, 675, 679.

This objection to the second count, I consider is well taken and should be sustained. In a late edition of Chitty's Treatise on Pleadings by I. C. Perkins, L. L. D., I find the form of a declaration or count on a policy of insurance similar to this prescribed, the conclusion of which is as follows:—"And although all conditions have been performed and fulfilled, and all events and things existed and happened, and all periods of time have elapsed, to entitle the plaintiff to a performance by the defendant of their said contract, and to enable the plaintiff to maintain, and nothing existed or has occurred to prevent the plaintiff from maintaining this action, yet the plaintiff hath not out of the stock and funds of the said company, or in any other manner, been paid or made good the said damage and loss so sustained by him as aforesaid (*if the policy gives an election to the defendants to reinstate, that clause must be set out in the declaration, and the following breach added here*) nor have the defendants reinstated the premises so injured and destroyed as aforesaid. And the plaintiff claims 2 Ch. Pl. 171. The omission of the alternative breach in the second count was a substantial defect, and must therefore be held fatal to it on the demurrers joined in the case.

Washington Baldwin *v.* James Coyle.

Foreign Judgment—Jurisdiction of Justice of the Peace.

A suit upon a foreign judgment is not within the jurisdiction of a justice of the peace in this State.

(*New Castle, December 6, 1885.*)

Appeal from Bertolette, Justice of the Peace for New Castle County.

The suit before him was on a judgment recovered by the plaintiff against the defendant in the Court of Common Pleas of Delaware County, in the State of Pennsylvania, for the sum of forty-three dollars and seventy-three cents and costs, with interest, etc.

Richardson, for the defendant, now submitted a motion to the court to dismiss the appeal because an action on a foreign judgment or on a judgment recovered in another State, even for a sum less than one hundred dollars, is not within the jurisdiction of a Justice of the Peace in this State.

The Court so held, and dismissed the appeal.

James B. Coffin *v.* Selby Lawson.

Trespass—Title by Possession.

Adverse, exclusive possession must be for twenty years to give a good title.

In a case of mixed possession of land, no other title being shown by either party, the law adjudges it to belong to the party who first acquired actual and exclusive possession.

In a case of mixed possession of land one of the parties, plaintiff, may recover for the exportation and conversion to his own use by the other party, the defendant, of the fence placed thereon by the plaintiff.

(*Sussex, April 7, 1886.*)

Trespass quare clausum fregit.

The defendant had entered the *locus in quo* then in possession of the plaintiff and took and carried away the rails of a fence therefrom.

B. F. Wayaman, a surveyor, was sworn and exhibited and explained a plot of the pretension of the plaintiff.

James B. Coffin, plaintiff, was born and lived on the land claimed by him until two years ago. The one and one-eight acres in dispute was used by my father's family as far back as I can remember, and it was customary for the family to cut their fire-wood from it. The first line fence I put there fifteen years ago, which remained undisturbed until it rotted down; and ten years ago I put a fence on the other line, which was taken down and carried away in 1883, just before this suit was brought.

David Coffin, brother of the plaintiff, testified that he had lived on the farm all his life. Fence has been on that line for fifteen or twenty years.

Willard Coffin, son of the plaintiff, testified to same facts.

Others testified that Lemuel Davidson bought the land in 1864 and moved on it in 1869 and remained three years, cutting timber on it during that time.

The tenant testified to using the piece of land in question in the same manner as other lands of his landlord.

Alfred P. Robinson, for the plaintiff: It is admitted that neither party has a paper title to this tract of one and one-eighth acres in dispute. Under the plea of *liberum tenementum* the burden of proof rests upon the defendent to show a freehold in the premises; it admits the possession and trespass. In the absence of paper title the law adjudges the title to the one having prior possession.

Charles M. Cullen, for the defendant: He who is in actual possession of land may maintain trespass against any other person except the real owner or him who has the right of possession.

When two parties have a concurrent or mixed possession of land, neither having any other title nor any exclusive priority of possession, one of them cannot maintain trespass against the other. 3 Metc., 239; 12 Johnson, 183; 9 Johnson, 61; 8 Mass., 415.

COMEGYS, C. J., charged the jury. Possession to be adverse must be exclusive for twenty years to give a good title. In case of a mixed possession of land where no other right or title to it is shown or proved by either party, the law adjudges it to belong to the party who first acquired the actual and exclusive possession of it, and if the jury were satisfied from the proof that the plaintiff had acquired exclusive possession prior to the defendant, then he was entitled to recover. If it is a case of mixed possession, the plaintiff could recover for the exportation of the fence rails put on the land by him and carried away and converted to his own use by the defendant.

Verdict for plaintiff.

MIERS REYNOLDS' Administrators *v.* GEORGE S. GRIER.

Parties to Suit.

A suit on a bond given to A and Son, if brought in the name of A alone, will be dismissed for want of proper parties.

(*Sussex, April 8, 1886.*)

ACTION OF DEBT on a bond with a condition.

The action was brought in the name of Miers Reynolds, who afterwards died and his administrators were admitted as plaintiffs.

The condition contained an agreement between the parties in which each of them bound himself to the other in the penal sum of five hundred dollars.

Robert D. Grier, subscribing witness to the bond, and the son of the defendant, saw his father, George S. Grier, one of the parties to it, sign his name to it as such, but he did not see the name of M. Reynolds and son subscribed to it by any one, nor does he know the hand writing, or by whom it was signed.

Bond offered in evidence.

Charles F. Richards, for the defendant, objected to its admissibility in evidence: 1. Because of the alterations of the bond by

interlineations. 2. The action is by Miers Reynolds alone, and not in the name of Miers Reynolds & Son.

THE COURT sustained the objection and ruled out the bond as evidence, and the agreement contained in the condition of it, on the second ground.

The plaintiffs took a non-suit.

James Lofland and *Charles M. Cullen*, for the plaintiff.

Charles F. Richards and *Jacob Moore*, for the defendant.

SAMUEL P. TRUAX *v.* WILLIAM W. PARVIS.*

Replevin—Venue—Demand—Additions to Contract—Remedies in a Conditional Sale.

In an action of replevin the place not being "material or traversable" the venue need not be averred or proven.

Where the taking was wrongful in the first instance, no previous demand is necessary for the maintenance of the action of replevin; but where the original taking was lawful but further detention of the property is unlawful, there must be a demand by the plaintiff upon the defendant and a refusal by him to comply therewith. No specific words need be used, but any language which is understood to be a demand on the part of the plaintiff and reply that was understood to be a refusal will be sufficient.

A new stipulation, added to a closed contract, made in the proper manner, before the separation of the parties, and intended to form part of the contract, will be so treated. It is a contemporaneous writing about the same subject matter, and when so intended is part of the original.

A person having sold personal property upon conditional sale, taking judgment notes for the price thereof, must make his election between his two remedies, and if he rely upon the notes for the purchase price, he thereby abandons his right to retake the property as secured by the contract of sale.

(*Kent, May 4, 1886.*)

ACTION OF REPLEVIN for a four-year-old colt, sold and delivered by the plaintiff to William S. Grasley, taking two judgment notes for one hundred and fifty dollars, the price; the horse to be the property of the plaintiff until the notes should be

* NOTE.—See this cases decided in the Court of Errors and Appeals and reported hereinafter.

paid. One of the notes was at four months for seventy-five dollars, and the other at six months for seventy-five dollars, dated April 18th, 1884. On the back of the last mentioned note was the following endorsement:

"Smyrna, April 18th, 1884, this day have bought of Samuel Truax, one bay colt, four years old, the said colt belongs to him until these two notes are paid."

Signed, 'W. H. Grasley."

The horse was afterwards levied on and sold by the sheriff as the property of Grasley, on the 9th day of October, 1884, and bought by James P. Barcus, who afterwards sold him to the defendant from whom the horse was demanded by the plaintiff without success prior to the commencement of this action. The plaintiff before the maturity of the notes assigned them to William B. Smithers in payment of a debt he owed him, but afterwards redeemed them from him.

James Pennewill, for the defendant, moved a non-suit, on the ground that the plaintiff had failed to prove the taking of the property in this county, or that the cause of action arose in it.

THE COURT refused the motion.

J. Alexander Fulton, for the plaintiff:

No money to this day has been paid on either of the two notes, cites, and reads from 5 Hous., 192.

Pennewill: I admit the law ruled in the case cited, but I contend that by the absolute assignment of the notes to Smithers in payment of a debt due him, the same were then paid to the plaintiff and he thereupon ceased to have any right of property in it pursuant to the terms and the condition of the sale.

James L. Wolcott, on the same side: This is a local action, and is not changed by our statute. The declaration in it is in the common law form strictly. It lies for the wrongful taking of personal property and not only for a wrongful distress for rent, or damage feasant. *Gilbert on Law of Replevin*, 157; 5 Rep., 107;

7 Rep., 80, 81; 7 Johns, 140; Stephen, Pl., Sec. App., note; 2 Greenl. E. Sec. 562.

Our statute simply enlarges or extends the remedy to a wrongful detention as well as the wrongful taking of goods without at all changing the character or nature of the action. *Windsor v. Boyce*, 1 Houst., 605; 2 Saund. Pl. & Ed., 767; 1 Tat., 53; *Cannon v. Horsey*, 1 Houst., 440; *Cann v. Wowen*, 1 Houst., 188; *Alderdice, et al. v. Truss, et al.*, 2 Houst., 268. The proof of the demand was not sufficient. In fact according to the testimony of the plaintiff himself, which is the only evidence we have on that point, as he was apprehensive if the defendant should suspect that he was about to proceed to recover the horse that from him, he would at once dispose of him or hurry him out of his reach, he was afraid to make a positive demand on him for the horse; and therefore what he said when on that occasion according to his statement of it, was no demand at all, but was more in the nature of a request merely for the return of it and was manifest that the defendant so understood it, for his reply to it was that he could not spare it. And as a refusal to surrender him, it was quite equivocal, as was the demand of the plaintiff for the surrender of it to him.

The defendant asks that the following instructions be given to the jury:

1st. That the action being local and the venue not proven, the plaintiff is not entitled to recover.

2d. That it must be proven that there was a positive demand and refusal before the replevin writ was issued, otherwise plaintiff is not entitled to recover.

3d. If the jury believe the agreement for conditional sale was signed after the terms of sale were complete; or that said agreement was a mere afterthought and voluntary act of William H. Grasley; or that said agreement was merely for the benefit of said Grasley and designed to protect the horse from his creditors, the plaintiff is not entitled to recover.

4th. It is for the jury to say whether plaintiff did not by the absolute assignment of the two notes, or by the transfer of all his claim—as mentioned in the postal card—or by other action or conduct, waive any condition which may have been connected with the original sale.

Fulton, for the plaintiff: I admit that replevin was originally a local action, and the reason was it related to real actions, but since the statute, when the wrongful detention of the goods merely constitutes the ground of action, it is a transitory action. But why is all this strife over the venue, for it was proven on the trial, on the question of sale, it was enough to say that in this case there never was any sale which transferred the absolute property, or anything more than a special or conditional property in the horse to Grasley, according to the express terms of the contract and conditional sale agreed upon between him and the plaintiff. And therefore ruling in the case of *Alderdice et al. v. Truss et al.*, cited from 2 Houst., has no application in this case.

COMEGYS, C. J., charging the jury:

We decline to give the first instruction. Although it is true of the action of replevin as we find its office, or chief purpose (the return to a plaintiff of property distrained for rent, or damage feasant) treated of in the books, that it is a local action and therefore must be brought in the county where the injury was done, be alleged in the narr to have been done there, and proof thereof made at the trial; yet having been extended particularly in this country, to illegal taking of personal property under any circumstances against the owner's consent, and being in fact a very familiar, and in truth the only action where the very goods *in specie* can be recovered which were tortiously taken, it would seem most reasonable that it should, as to such cases, be no longer treated as a local action—especially, using the language of Blackstone, as the injury could as well have been done in one place as another. This question has only arisen in three cases, we think; in that in Zabriskee's Reports (New Jersey) in that Watts (Pennsylvania) and in the case of *Windsor v. Boyce*, 1 Houston, 615.

In New Jersey the decision was that the action, as for the cause in that case, was still local; in Pennsylvania it was held the contrary; and in this State, the point was made (in an action for taking away a slave) but was not decided—the plaintiff having failed to prove either a tortious taking, or an unlawful detention, one or the other of which was necessary to his action. That being sufficient ground for non-suit, the Court placed it upon such ground

not passing upon the point of materiality of averment and proof of venue. The plaintiff's counsel in that case quoted the 12 Section of Chap. 106 in the Rev. Code about pleading and practice. Aside from the argument that the adaptation of an old form of proceedure, or process, to a new subject matter, ought not, necessarily to impress every characteristic of that form upon such subject matter where there would be incongruity or unfitness in so doing, it is by no means unreasonable to think that the section referred to applies, and was meant to apply, to just such cases as the present. In what I think may not unfitly be called the *reform chapter* of the Code (Chap. 106, of Pleading and Practice in civil actions) that section is to be found in these words—"It shall not be deemed necessary in any declaration, or other pleading, to lay the venue in the county in which the action is brought, nor to set forth in any manner the place in which an act is alleged to have been done, unless when, from the nature of the case, the place may be material or traversable." This seems to be very unequivocal language, without any ambiguity or uncertainty about it. It was, when introduced into our system by the Revisers of 1852, entirely new to it: there was nothing like it here, before that time. One of the objects of the revision of the laws as understood and observed by them, was certainty of expression so as to avoid, if possible, future contentions about meaning. It would seem they fully attained that object in the language used in this section. They must be supposed, as a body at least, to have intended something other than *form of action* when they used the words "nature of the case"—as one expression has a definite unequivacal meaning, and the other is like explicit. "What is your form of action," would not be answered by saying, "a tortious taking of a horse," no more than the inquiry, "what is the nature of your case," would be responded to by saying—"replevin." The form in which a suit is brought, and the subject matter of it, or its cause of action, nature of its case, are totally distinct subjects. The section would seem to have been intended to dispense with any statement of venue, or proof of it in any suit except where the facts or *nature of the case*, show that the suit has (where the form for example is trespass, or case) relation to, or is in some way connected with, the realty.

Without intending, however, to decide the question definitely, it is sufficient to say that as we declined to non-suit the plaintiff at the close of his case for alleged want of proof of venue, so now we refuse to give the jury the instruction the defendant prays for. Besides, it would be improper to do so, in view of the fact that the plaintiff contends, though disputed by the defendant, that he proved the alleged demand and refusal to have been made on the defendant in this county. That is for the jury.

With respect to the said prayer for instructions we say to the jury—that where the taking has been a wrongful one in the first instance, no demand is necessary for the maintenance of the action of replevin; but where it was originally lawful, as in this case, and yet it is claimed that further detention of the property is unlawful, before the action can be brought to recover the specific thing detained, there must be a demand by the plaintiff upon the defendant for it, and refusal by him to comply therewith. Although such demand and refusal are requisite, yet the law does not require any form of words for either. Neither the word *demand*, nor the word *refuse* is necessary to be used; but any words will suffice, provided they are understood by the parties to be a claim of property on one side and to have it delivered to the claimant, and refused so to deliver. It is common enough for a party holding another's obligation, for example, to present it and say, "I should like to have the money on this." No doubt, a debtor well enough understands what such a communication means. This, however, is entirely a question for you. If you believe the language used by Truax to Dr. Parvis was intended by him for a demand of the horse, and was so understood by the latter, and that his reply was intended as a refusal and to be understood by Truax, then the law has been complied with, and demand and refusal proved.

The third prayer calls upon us to instruct you that the agreement written on the back of the note payable on the 18th of October, 1884, was no part of the contract of sale, which was complete without it; and being no part, the sale was absolute, and not conditional. An absolute sale is one where the property in personal chattels (as is this case, the horse) passes to the buyer upon the completion of the bargain, or treaty between the parties. Where one party offers to sell at a certain price, and the other agrees to give it,

there is a complete bargain and sale, and the property passes from the bargainor to the bagainee. Such was the case of *Alderdice v. Truss*, cited by the defendant's counsel as having been decided by this Court. But though the property passes, delivery cannot be required until the money is paid where the sale is for cash. Where it is upon a credit, to be secured by notes, or other instruments, they must first be delivered, or tendered. In this case, there was an agreement to sell, and price fixed. So far, so good. But there was also an understanding, as part of the treaty of sale, that there should be a credit of four and six months by two notes of equal amounts, for the purchase money. The parties went to Truax's house to close the bargain by the notes. They were drawn by Grasley, and submitted to and read by Truax, who approved them and they were handed back to Grasley, who placed them on the table. Almost as soon as this was done, Grasley suggested that for greater security to Truax, he, Grasley, would sign a writing that the horse should not be his, until the notes were paid. This was assented to, and accordingly Grasley wrote the language on the back of the note last payable. Upon this being done, the parties left the house and proceeded to the stable where the delivery of the horse was formally made to Grasley. The plaintiff contends that the act of making and signing the writing on the back of the note, made the sale in this case conditional—that is that Truax had the right to retake the horse upon non-payment of the notes. The defendant denies this, and insists that the agreement was an independent act and does not impress upon the sale the character of a conditional one. While the question is not one altogether free from difficulty, still we think that everything that was done upon the occasion of closing the negotiations, should be treated as part of them, as they were simultaneous. It is true that when the notes were drawn up, signed, read by Truax and approved, the original understanding or bargain was complete, and Grasley could then have demanded the horse and no right to refuse delivery would have existed; yet the proposal of Grasley with respect to ownership, accepted by Truax, in effect opened the agreement, and added a new term to it—just as a new stipulation, added to a closed contract, made in the proper manner, before the separation of the parties and intended to form part of it, is treated to be part of it.

It is a contemporaneous writing about the same subject matter, and where so intended is part of the original. In this view, we decline to give you the instructions in question. Of course if there were any proof that Truax knew this agreement was a sham, and was intended for Grasley's benefit and to cheat his creditors, it would have no effect; we have heard none.

With respect to the 4th and last prayer for instructions, we yield to it so far as to say—that if you are satisfied that by the assignment of the notes by Truax to William P. Smithers, he intended to make an election, or choice, between his two remedies for his protection in the sale of his horse, and chose to rely upon the notes for the purchase price rather than the right to retake secured by the contract of sale, he must be held to that choice, and fail in this action. At the same time, however, you must take into account, as an element in deciding what he really intended, that, notwithstanding the assignment he still remained liable upon them in the event of Grasley's insolvency, which in fact was shortly developed. In fact the assignment was not made until two days after he was sold out by the sheriff.

As to the postal card, offered in evidence by the defendant, it cannot be held to defeat this action, the cause of which having been transferred to Isaac Truax, is to be treated as subsisting for his benefit.

Verdict for the plaintiff.

COURT OF ERRORS AND APPEALS,

JUNE TERM,

1886.

WILLIAM H. SWIFT, plaintiff in error *v.* STATE, *ex. rel.* DAVID M. RICHARDSON.

Mandamus—Jurisdiction of Court—When Granted—Foreign Corporation.

The writ of mandamus and the right to it in all cases to which it is applicable is clearly recognized in the jurisprudence of this State; but issues only where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy; the writ is never granted in doubtful cases.

A stockholder in a private corporation is entitled to an inspection and copies of its books, papers and other documents at proper times and on proper occasions, the stockholder showing clearly a right on his part to such inspection and copies; and on refusal thereof by the *custos* of such documents, may have a mandamus to compel said *custos* to allow the same; and the corporation need not be made a party to the proceedings.

When a foreign corporation holds property and does business within this State it subjects itself to the law of this State in the same manner and to the same extent, in respect to such property and business, as it would be bound to were it a corporation created by this State, and owes obedience to the mandates of the courts of this State in these respects as if it were a domestic corporation. And a non resident stockholder of said corporation has the same rights in respect thereto as a resident stockholder.

Grubb, J., dissents.

(*June 15, 1886.*)

ERROR to review a judgment* of the Superior Court of New Castle County in favor of relator, granting a writ of *mandamus*

*NOTE—See page 137.

to compel defendant, a corporate officer, to permit relator, a stockholder, to make copies of certain entries in the company's books. *Affirmed.*

This was an application by David M. Richardson, the relator, a resident of Michigan and a stockholder in the Diamond Match Company, a corporation of Connecticut, owning property in this State, for a *mandamus* to compel William H. Swift, a resident of this State, its president, who had possession of certain books and papers belonging to the company, to allow relator to make copies thereof.

These copies were wanted by Richardson for use in certain legal proceedings in the State of Michigan brought by him against Christian H. Buhl and Russell A. Alger of Detroit, to restrain them from selling certain stock of the Diamond Match Company, which he claimed.

This stock had been pledged by Richardson to Buhl and Alger in 1879, and 1880, to secure them against loss by reason of certain indorsements on his notes and as sureties on his bond, under an agreement that Buhl and Alger were to receive a proportion of the net earnings of the stock, and not merely the dividends declared on the same; that on settlement no loss that might be charged on account of the purchase and sale by the company of other match factories should be taken into account; that the earnings were to be estimated from the trial balances of books of the company, and allowance to be made for loss or shrinkage in value of the property of the company, and consideration taken of the improvements made out of the earnings.

Richardson paid his notes and the bond was discharged, but Buhl and Alger refused to deliver the stock to him, claiming that there was still a large balance due them for net earnings of the company during 1881 and 1882. On their proceeding to sell the stock, Richardson brought a suit for an injunction against them, and for use in such suit applied to Swift, as president of the company, for copies of the books in order to show the true net earnings during that time and what deductions from the earnings were proper to be made on account of loss and shrinkage of the property, and what sum should be charged for improvements and ex-

penditures necessary to be made in order to enable the company to make such earnings and profits.

Swift allowed Richardson to inspect the books, but refused permission to make copies; whereupon, Swift applied to the court for a writ of *mandumus* to compel such permission.

At the hearing of the rule in the court below it was stipulated that if the court should be of opinion that the writ should be granted, a peremptory and not an alternative writ should issue. The court granted the writ of *mandamus* and defendant sued out this writ of error.

George Gray and *Benj. Nields*, for plaintiff in error.*

William C. Spruance and *William M. Lillibridge*, for defendant in error.

Saulsbury, Chancellor, delivered the opinion of the court:

The case comes before us upon a writ of error to a judgment of the Superior Court of this State in and for New Castle County, in favor of David M. Richardson against William H. Swift, president of the Diamond Match Company. Richardson was the holder and owner of shares of stock in the Diamond Match Company, a corporation under the laws of Connecticut. Swift was a director and president of said company, and resides in this State.

As a stockholder in said company, Richardson applied to Swift for permission to inspect and take copies of certain papers and documents in his possession, for a purpose which he alleged was necessary and proper, and material to his interest as a stockholder in said company. Inspection was not refused, but permission to make copies or memoranda of said papers and documents was refused. Thereupon Richardson presented his petition to the court below, praying said court to award a writ of *mandamus* against Swift, commanding him to suffer and permit said Richardson to inspect and make copies of the instruments, books, papers, and writings in his custody or control belonging to the said Diamond Match company, to wit:

1. All contracts and agreements for the purchase, by or on

*NOTE. For briefs of counsel, see this case in court below, page 137.

behalf of the said Diamond Match Company, of match factories, and other property relating to the same, prior to January 1, 1881;

2. All instruments in writing conveying or assigning to said company, or other persons in its behalf, property, rights, or franchises relating to the manufacture of matches prior to said last mentioned day.

3. All contracts, agreements, or conveyances relating to said purchase of property by or on behalf of said company, other than for materials or supplies in the usual course of its business prior to said last mentioned day.

4. All bonds, contracts and agreements, not to engage in the match business, made to or with said company prior to said last mentioned day.

5. All books, papers and writings of said company, showing the net earnings of the company for and during the years 1881 and 1882.

To Richardson's petition Swift filed an answer, in which he does not deny that the papers and documents mentioned in Richardson's petition, and sworn to be in his possession, were in his possession at the time of the service of the writ or were then in his possession, but states:

"That the law of the said State of Connecticut, under which said corporation was created and exists, provides that 'The statements and books of every such corporation shall be kept in the town where it is located, and shall, at all reasonable times be open to the inspection of its stockholders; and as often as once in each year a true statement of the accounts shall be made and exhibited to the stockholders.' And the said law further provides 'That the president and treasurer of every joint stock corporation shall annually, on or before the 15th day of February or August, lodge with the town clerk of the town in which said corporation is located, a certificate, signed and sworn to by him, showing the condition of its affairs, as nearly as the same can be ascertained, on the first day of December or January, or on the first day of June or July, next preceding the time of making such certificate, in the following particulars, to wit: 1. The amount of the capital stock actually paid in; 2, the cash value of its real estate; 3, the cash value of its personal estate, exclusive of patents; 4, the amount of

its debts; 5, the amount of its credits; 6, the name, residence and number of shares of each stockholder.'"

The defendant, Swift, also in his answer says:

"That, in conformity to the provisions of the said law, as aforesaid, the statement and books of the said corporation have been and are now kept in the town of New Haven, where it is located as aforesaid, and have been at all times and are now open to the inspection of any of the stockholders; and that, in the month of February in each year since the organization of said corporation, the certificates required by said law, as aforesaid, signed and sworn to by the president and treasurer of said corporation, have been duly lodged with the town clerk of said town of New Haven, and duplicates thereof, made and sworn to as required by said law, have been lodged by them, as aforesaid, with the secretary of the said State of Connecticut; and that in all respects the requirements of the said law, as set forth in the relator's exhibit B, have been fully and faithfully complied with by the said corporation and its officers, and that the said statements and books were not, at the time of the filing of said petition, or at any time since, in the custody or possession of the said William H. Swift."

Now, it will be observed that the relator's exhibit B, in respect to which Swift in his answer says that the requirements of the law have been fully and faithfully complied with by the said corporation and its officers, relates only to: 1, the amount of the capital stock actually paid in; 2, the cash value of its real estate; 3, the cash value of its personal property, exclusive of patents; 4, the amount of its debts; 5, the amount of its credits; 6, the name, residence, and number of shares of such stockholders. And it was in reference to these that Swift says that "The said statements and books were not, at the time of the filing of the said petition, or at any time since, in the custody or possession of the said William H. Swift."

He nowhere makes a similar declaration in respect to the documents and papers, an inspection of which, and the privilege of making copies of which, was demanded of him by the relator, and the privilege of taking copies of which was refused by him. This will appear manifest from the answer of Swift to the petition filed in the court below. He therein says that "This respondent is with-

out authority from said corporation to permit, and is expressly prohibited by said corporation from permitting, the said relator to make copies of its books, papers, or instruments of writing, which may be in his custody or control as president of said corporation, for the purposes mentioned in said petition, unless required so to do by the laws of the State of Connecticut, under which the said corporation exists."

He further says that "To allow copies of all the instruments, bonds, contracts, agreements, books, papers or writings belonging to the said corporation, and mentioned in said relator's petition, to be made by the relator for use and publication in his said suit, would greatly impede, hinder and obstruct the conduct of the business of the said corporation, and injure and greatly damage the interests of the same, and of its other stockholders."

From this, also, it appears that the papers and documents mentioned in the relator's petition as in the possession of the said Swift, and the privilege of taking copies of which was demanded by him, and refused by the said Swift at the City of Wilmington, where they were in said Swift's possession, were not the same as those required to be kept in New Haven by the Act of the State of Connecticut under which the Diamond Match Company was organized, and were not the same statements and books as those mentioned in the relator's exhibit B, which Swift in his answer says were not, at the time of the filing of the said petition, or at any time since, in the custody or possession of the said William H. Swift.

When Swift says that "The said relator has been furnished with statements showing fully and accurately what were the net earnings of the said corporation during the years 1881 and 1882, and has been permitted by the said corporation full and free access to all books, accounts, bonds and papers mentioned in his petition, and to inspect the same personally or by his attorney," he nowhere denies that demand was made upon him by the relator for permission to make copies of the books, accounts, bonds and papers, and that such demand was refused by him.

The right to make copies, and to make abstracts and memoranda, of documents, books and papers, by a stockholder in an incorporated company, is as full and complete as the right of inspec-

tion thereof. David M. Richardson, the relator, a resident of the State of Michigan, was and is a stockholder of the Diamond Match Company, a corporation created under the laws of the State of Connecticut. William H. Swift, a resident of the City of Wilmington, in the State of Delaware, was and is a stockholder in the said corporation, and president thereof.

There was and is no law of the State of Connecticut requiring that the president of said corporation should be a resident of the State of Connecticut, There was and is no law of said State requiring that the papers and documents mentioned in the relator's petition should be kept in New Haven, or in the State of Connecticut. They were, in fact, kept in the City of Wilmington, in the State of Delaware, and in the possession of William H. Swift, at the time of the demand and refusal of the privilege of copying the same, and are there yet in the same possession, so far as we know from anything in this case.

The grounds upon which the awarding of the *mandamus* was resisted in the court below, and upon which the reversal of the judgment below is asked in this court are sufficiently stated in the answer of Swift, and are as follows:

"And the said William H. Swift further says that the said David M. Richardson and the said Christian H. Buhl and Russell A. Alger are all residents of the State of Michigan, and the controversy and suit pending between them, as appears from the said relator's petition and exhibits filed, arises upon a contract entered into between them in the said State of Michigan, and which was made with respect to the laws of the said State; and the said controversy and suit do not arise upon any contract or engagement entered into in the State of Delaware, or with respect to the laws thereof; that the said controversy or suit is not with or against the said corporation, or for the purpose of establishing or maintaining any right of the said relator as a member of the said corporation, or compelling the exercise or performance, by any officer thereof, of any corporate function or duty; and that the suit or controversy does not arise out of or upon any contract or engagement by or on behalf of said corporation, or out of or by reason of any duty imposed by the law upon said corporation, and that the said corporation is not a party to said suit, or interested therein, and can in no-

wise be affected by its determination; that this respondent is without authority from said corporation for permitting said relator to make copies of any of its books, papers or instruments of writing, which may be in his custody or control as president of said corporation, for the purposes mentioned in said petition, unless required so to do by the laws of the State of Connecticut, under which the said corporation exists; that to allow copies of all the instruments, bonds, contracts, agreements, books, papers or writings belonging to the said corporation, and mentioned in said relator's petition, to be made by the relator for use and publication in his said suit, would greatly impede, hinder, and obstruct the conduct of the business of the said corporation, and injure and greatly damage the interests of the same, and of its other stockholders."

A *mandamus* may be defined to be a command issuing from the Superior Court, directed to some person, corporation or inferior court, within the jurisdiction of the superior court, requiring them to do some particular thing therein specified which by law they are bound to do, and which a superior court has previously determined or at least supposes to be consonant to right and justice.

It is unnecessary for the purposes of this case to trace the origin and history of the writ of *mandamus*. While it is true that in England it was originally what is called a "prerogative writ," and is there generally treated as such, in this State, and in this country, it is simply a writ, divested of all its prerogative features, for the enforcement of a remedy by a person having a legal right against another person withholding that right.

Prerogative writs, as such, may be said to have no existence in this State, or in this country. The writ of *mandamus*, and the right to it in all cases to which it is applicable, is as clearly recognized in our jurisprudence as any other writ which may be issued out of the courts of law to which a party may be entitled. A clear recognition of this as settled law will go far to devest the character of the writ of much seeming mystery or obscurity of meaning with which it has been customary to surround it, and will greatly simplify the issue involved in this cause, which is nothing more nor less in its nature or character than a suit at law between one person as plaintiff and another as defendant.

Thus considered, the only questions for us to decide in this

case are: Has David M. Richardson, the plaintiff, shown a clear right against William H. Swift to be permitted by him to inspect and take copies of the papers in the petition mentioned? Has he made demand, and been refused the privilege of so doing by said Swift? Has he any other remedy, or is the writ of *mandamus* his only specific remedy for the enforcement of a clear right which has been denied him? Has he no other adequate or specific legal remedy to compel the inspection, and the right to take copies of the papers and documents mentioned in his petition? Has the relator shown a clear legal right to the particular thing which he has demanded? Has the right been refused by William H. Swift? Did Swift act wrongfully and illegally in refusing the relators's right? And is there no other way in which the relator can legally enforce his right except by the writ of *mandamus*? These are the questions, and the only questions, which are necessary to be decided by us.

The writ of *mandamus* only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. The right which it is sought to protect must, therefore, be clearly established; and the writ is never granted in doubtful cases. The exercise of the jurisdiction to grant it rests, to a considerable extent, in the sound discretion of the court, subject always to the well settled principles which have been established by the courts.

The test to be applied in determining the right to relief by *mandamus* is to inquire whether the party aggrieved has a clear legal right, and whether he has any other adequate remedy, since the writ only belongs to those who have legal rights to enforce, and find themselves without an appropriate legal remedy. "In such case," says High, "the right to the extraordinary aid of a *mandamus* may be regarded, to that extent, as *ex debito justitiæ*." The relator must show, not only that he has a clear legal right to have the particular thing in question done, but also the right to have it done by the person against whom the writ is sought.

A corporator may have a *mandamus* to compel the *custos* of corporate documents to allow him an inspection, and copies of them, at proper times and on proper occasions; he showing clearly

a right on his part to such inspection and copies, and refusal on the part of the *custos* to allow it. Ang. & A. Corp., 775 and notes of authorities cited; High, Extr. Rem.

Indeed, upon this point the authorities are uniform, and I shall not burden this opinion with the citation and examination of the numerous authorities which have established it as settled law.

Swift never in his answer objects that the corporation, the Diamond Match Company, is not a party to the proceeding. He nowhere denies that he is the *custos* of the papers, documents, etc., an inspection and copies of which have been demanded of him and been refused by him. If he was such *custos*, it was not necessary, in my opinion, that the corporation should have been a party to the proceedings. Had the corporation been created by the laws of this State, it would not have been a necessary party to these proceedings. "Indeed," says Angell & Ames on Corporations, 775, "it (*mandamus*) lies to any person who happens to have the books of the corporation in his possession, and refuses to deliver them up.

And High Extr. Rem. (section 31), says, which is more pertinent to the point under consideration:

"As regards the person to whom the writ should be directed, when an inspection of corporate records is sought, the proper practice is to address it to the one actually having the custody of the books and records, even though he is merely a ministerial officer acting under the direction of others, as in the case of a bank cashier acting under a board of directors. In such case the rule applies that the writ should run to the particular person who is to perform the act required, and the cashier having charge of the books, his refusal to allow their inspection is his individual act, and the writ is therefore properly addressed to him, but there is no impropriety in such case, in directing the writ also to the board of directors."

If the writ should be addressed to the one actually having the books and records, even though he is merely a ministerial officer acting under the direction of others, as a cashier of a bank acting under the board of directors (*People v. Throop*, 12 Wend., 183), it would seem that the corporation was not only not a necessary party, but should not be a party according to such practice, although the

addition of the corporation, or including it in the rule, would not vitiate the proceedings; and the reason is this: that, while the *custos* would be the party to whom the writ should be addressed, he having the books, papers, etc., in his possession, there would be no impropriety in allowing the corporation, whose agent the *custos* was, to answer the rule, and show cause, if it could, why its agent should not be compelled by the writ of *mandamus* to allow the inspection and copies of the same.

Taking this, therefore, to be the proper practice in cases where the *custos* is in possession of the documents and papers, an inspection and copies of which are demanded, and in cases where the corporation is a domestic one, can there be any reason why the rule should be different where the corporation is a foreign one; the *custos* being domiciled in this State, and having possession of the books, papers, and documents by authority of the foreign corporation? I can see none. Swift in his answer says that "The said Diamond Match Company is a corporation created by and existing under the laws of the State of Connecticut, and is not a corporation created by or existing under any law of the State of Delaware; and that the same is located in the town of New Haven, in the State of Connecticut, though it does hold real and personal property in the State of Delaware, and transacts business incidental to its business within the State of Connecticut."

Now, if it holds real and personal property in the State of Delaware, and transacts business incidental to its business within the State of Connecticut, it holds such property and transacts such business by the comity of the State. Its president lives here, and is the *custos* in fact of the documents and papers, an inspection of which, and the privilege of taking copies of which, the relator seeks. The corporation itself does business here, not as a corporation created by the State of Delaware, but as a foreign corporation created by the law of Connecticut.

What results from this? That acting here as a foreign corporation, and holding real and personal property, and doing business as such within this State, it submits or subjects itself to the law of the State, in the same manner and to the same extent, in respect to such property and business, as it would be bound to do were it a corporation created by the State of Delaware; and it owes

obedience and subjection to the mandates of its courts in these respects as fully as if it were a domestic corporation.

Was William H. Swift the legal *custos* as well as the *custos* in fact of the documents and papers, an inspection and copies of which the relator seeks? No Act of the Legislature of Connecticut, and no by-law or rule of the corporation, has been produced showing that provision was therein made for the custody of said books and papers. Nothing has been shown us which requires said documents and papers to be kept within the State of Connecticut. They have not been shown to have been in the possession of any other person than William H. Swift. William H. Swift has for many years resided, and still resides, in the City of Wilmington, in the State of Delaware. He has, and ever has had, the actual possession and control of the same, as far as their history has been made known to us. His possession of them is not to be presumed unlawful, but is, I think, presumed to be lawful. Service of the rule was made upon him, and an answer to it was made by him. He signs himself to said answer as William H. Swift, president of the Diamond Match Company.

Now, suppose Mr. Richardson, the relator, instead of being a citizen and an inhabitant of the State of Michigan, was a citizen and inhabitant of the State of Delaware, and a stockholder in the Diamond Match Company; could anyone reasonably doubt that the courts of Delaware would be competent to afford him the relief he asks by granting him the State's writ of *mandamus?* Does the fact that he is a citizen and inhabitant of the State of Michigan affect his rights in this respect? I think not. Has he not the same rights, as a stockholder in the company to the inspection and copies of the books, papers and documents in the possession of Swift, who must be presumed to be the agent of the directors of the company in respect to such books, papers and documents, and the custody thereof, and who is in fact the president of the company as he would have were he a citizen and an inhabitant of the State of Delaware? Has he not the same rights in respect thereto, in the courts of Delaware, as the citizen and inhabitant of Delaware would have?

Section 2, Art. 4, of the Constitution provides that "The citizens of each State shall be entitled to all privileges and immuni-

ties of citizens in the several States." Among the rights secured is the right to sue in the courts of any State. This is settled by judicial decisions beyond legal controversy.

It does not matter, for the purpose of this case, where the said David M. Richardson and Christian H. Buhl and Russell A. Alger reside, nor how the controversy and suit pending between them arises. The question is: Has the relator shown a clear right to inspect and take copies of the books, papers and documents mentioned in his petition? It is not material who are the parties to the suit in Michigan mentioned in the respondent's answer, nor out of what it arises. The question is: What are the rights of Richardson, the relator, as against Swift, the respondent, in respect to the papers and documents of which Swift is the legal *custos?* It is not in the power of the corporation to prohibit its president and agent from obeying the mandate of the court below. Courts of law are not prohibited from exercising their rightful jurisdiction by such feeble authority, nor will they heed such impotent obstructions. If they have jurisdiction, in all proper cases they will proceed to judgment, and execute their judgments in the manner the law provides.

But the respondent says that "To allow copies of all the instruments, bonds, contracts, agreements, books, papers or writings belonging to said corporation, and mentioned in said relator's petition, to be made by the relator for use and publication in his said suit, would greatly impede, hinder, and obstruct the conduct of the business of the said corporation, and injure and greatly damage the interests of the same, and of its other stockholders."

Why awarding the writ of *mandamus* in this particular case should be attended by such consequences to the corporation is not readily to be perceived. If its transactions have been fair and just in all respects to the members of the corporation and others, it is presumed that such transactions will bear the light of inspection and criticism without impeding, hindering or obstructing the conduct of the business of the corporation, or injuring it in any respect whatever; but the right of Richardson to the relief he seeks depends, not upon the consequences that may result to the corporation, but upon his showing to the satisfaction of the court

that he is entitled to the inspection and copies of the papers mentioned in his petition.

It does not follow that although the court below had the right, and it was its duty, to award the writ of *mandamus* against Swift under the circumstances of this case, the power of the Superior Court in respect to a foreign corporation is unlimited, and may be exercised in respect to all matters in which foreign corporations are concerned. The Superior Court, and even the State of Delaware itself, cannot forfeit the charter of a foreign corporation. It cannot compel the election of a stockholder, nor prevent the removal of one. It cannot, in general, intermeddle with or control the internal concerns of a foreign corporation. Its jurisdiction in respect to such corporations is extremely limited; but it has power to see that the officers, agents, and servants of such corporations, transacting business in this State, by the comity of the State, shall yield obedience to the laws of the State.

I have not made reference to the fact that there is an Act of the Assembly of this State, conferring the right on the Diamond Match Company, a corporation of the State of Connecticut, to hold real and personal property, and to transact its business, within this State; for, although the Act is mentioned in the brief of the respondent's attorneys, and referred to in the argument, it is nowhere stated in the record sent up to us from the court below. The ownership of the property, and the transaction of the business of a foreign corporation, is admitted by the respondent in his answer. The obligations arising from state comity are the same as those that would arise from such an Act of the General Assembly, and would be so regarded by the courts of law.

For the reasons which I have stated I think that the judgment of the court below should be affirmed, with costs.

HOUSTON, J., concurred.

GRUBB, J., dissenting:

After mature consideration of this case, and of the principles which in my judgment should control its determination, I feel constrained to dissent from the judgment pronounced by the majority of this court.

As presented by the record now before this Court on error, it is, in its peculiar features, a case of first impression in this State and, apparently, without precedent in the courts of either this country or England.

Its circumstances are most novel: The relator below is a citizen of Michigan and a stockholder in the Diamond Match Company, which has been incorporated exclusively under the laws of Connecticut, and holds property and transacts a part of its business in Delaware.

Being involved in a suit in Michigan, solely against citizens of Michigan, relating wholly to his stock and the net earnings thereof in said corporation, pledged by him to the defendants in said suit as security for a loan by them to him, the said relator has applied to the Superior Court in Delaware, as such stockholder, for a mandamus against the respondent Wm. H. Swift, as president of said corporation, who resides in this State and has in his custody here certain books, agreements and other instruments belonging to said corporation, to compel said Swift, as such president, to allow the relator to make inspection and copies in Delaware of said books, etc., for purposes of evidence in his said suit, and which he alleges are necessary to enable him to maintain it.

The adjudification of this case does not require either the consideration or decision, of all the various and interesting questions raised at the argument. I shall, accordingly, confine myself to the principal inquiry upon which its decision depends, and refrain from determining whether or not a stockholder in a private corporation is entitled to have copies of its corporate books, contracts, etc., for use in a suit to which the corporation is not a party and in the result of which it is not interested; or whether or not, in case such right exists, the corporation should be made a party to mandamus proceedings for its enforcement; or whether or not, in the present instance, the said respondent Swift was authorized under any law of Connecticut to have the custody and control, in Delaware, for any purpose, of the books, agreements, etc., specified in the petition of the relator below, and particularly for the purpose of allowing the relator to make inspection and copies thereof in this State for the object mentioned in his said petition.

It may be well to observe, however, that it is a well settled

principle of law that a corporation can do no acts, either within or without the State which creates it, except such as are expressly authorized by the law creating and empowering it, or derived from a true construction thereof; and the acts must be done in the manner and by the officers or agents indicated in such law.

Bank of Augusta v. Earle, 13 Peters, 587; *Railroad v. Koontz*, 104 U. S., 11, 12; *Field on Private Corp.*, Sec. 243, 261.

In this connection the serious question arises: "Has the relator shown affirmatively and beyond doubt (as the law governing the allowance of mandamus requires him to do) that any law of Connecticut either expressly or impliedly authorizes Swift, even to have in Delaware, except possibly for his own convenience as president, the said books, etc., specified by the relator, much less to allow a stockholder to make inspection and copies of them there?" And if not affirmatively shown, can this be presumed in view of the settled principle regarding acts done outside of the State of domicile, and in view of the refusal of the board of directors to permit Swift to allow such copies to be made by the relator in Delaware?

The relator, as the record discloses, nowhere avers or shows that Swift was expressly so authorized; not does it appear expressly in any way.

Is there anything, then, in any law of Connecticut which implies any authority or imports any design to have the said books, agreements, etc., of the said corporation taken or used outside of Connecticut for the purpose of allowing a stockholder inspection or copies of them in Delaware or elsewhere? Do not the express provisions and the general purport and policy of the Connecticut incorporation law more reasonably imply the contrary? Especially those provisions which require that the corporation shall be located in a particular town in Connecticut, where its books and annual statements shall be kept, and shall at all reasonable times be open for the inspection of any of its stockholders; that an assistant treasurer shall be appointed when the treasurer shall reside out of Connecticut, who shall reside within the State, and upon whom notices in all legal proceedings may be served, and who, instead of the treasurer, may sign the annual statements showing the condition of the corporate affairs?

Do not these, in connection with the provisions of said law requiring the attorney for the State, whenever he shall be of the opinion that the public good requires it, to institute proceedings for a dissolution of the corporation, strongly imply that the books and other papers and instruments necessary to ascertain the exact condition of the corporation, shall be kept in Connecticut for the convenience of that State, in case dissolution proceedings should be required at any time, and, therefore, that the stockholders' right to inspection, and copies, if it exist at all, is subordinate to this paramount claim of the State, and that the exercise of such right without the limits of Connecticut is inconsistent with both the law and the rights of said State?

And is Swift's mere possession of the said books, agreements, etc., in Delaware alone sufficient, in view of the foregoing, to raise the legal presumption that he was lawfully authorized to have them here for such inspection and copies? Is it not more reasonable to infer that he had them here exclusively for his own convenient examination and use as president of said corporation?

And is it not to be presumed, since the record shows nothing to the contrary, that, being a corporate officer, he would do his duty as such in all respects, and would, therefore, return them to Connecticut whenever required by said corporation, or by the courts of that State, to do so for any lawful purpose; and that, consequently, the relator might have had the inspection and copies sought by him if he had made application therefor to the said corporation or the proper court, in Connecticut, instead of applying therefor in Delaware?

In the light of the foregoing considerations, are not the probabilities against, rather than in favor of the relator's alleged right to have inspection and copies outside of that State? At the best, is not this right doubtful? If so, the relator is not entitled to relief by mandamus, for the writ is never granted in doubtful cases and the onus is upon him clearly to establish his right. High Ex. Rem., Sec. 9.

But I pass to the graver question—to that which is the paramount inquiry in this case, and the proper determination of which will be sufficient decisively to dispose of it. Has the Superior Court in this State, under existing constitutional and legislative

provisions, jurisdiction by mandamus over a foreign corporation, its officers or agents, to enforce the performance of a corporate duty not imposed by any law of this State?

A careful investigation of the theory upon which corporations both public and private are created, and also of the theory upon which mandamus has hitherto been awarded and employed, especially in this State, must, as I conceive, furnish a negative answer to this inquiry.

The power to confer corporate franchises and privileges always has been considered as vested in the sovereign authority of the State.

The creation of a corporation, whether public or private, is an act of sovereignty whereby a portion of the sovereign powers is conferred upon the corporators. In this country corporate rights and franchises can only be conferred by legislative enactment. Field on Private Corp., Secs. 11, 15; *Bank of Augusta v. Earle*, 13 Peters 595, 587.

Corporations are created, and their rights, powers and privileges are granted for the public good. *Dartmouth College v. Woodward*, 4 Wheaton, 637.

In the case of private incorporations, which are grants of exclusive franchises and special privileges to particular individuals, the theory that such corporations are created for some supposed public good has furnished the legitimate ground in this country, for such an exercise of legislative power. Cooley Const. Lim. p., 394. In Field on Private Corp., Sec. 17, it is said: "The legislatures of the several states have, by their respective constitutions, the power to make laws and legislate upon all subjects pertaining to the public benefit, and this, in the absence of express provisions on the subject, carries with it by implication, the right to use all the means requisite to the accomplishment of the objects of legislation consistent with the purposes for which the government is instituted and with the state and national constitutions. The public benefit to be derived is the consideration on the part of the State for the creation of private corporations. The motive of the sovereign creating it is supposed to be some good the public will derive from it. This advantage has been considered sufficient to bring their creation by the legislatures within the scope of the general powers

to legislate for the public benefit, and it seems now to be universally recognized."

In consideration, therefore, of the grant of special privileges and franchises the corporation accepting it enters into an implied obligation to the sovereign grantor to exercise all the functions and perform all the duties necessary to fulfill the ends of its creation and promote the supposed public good; and this implied contract made with the sovereign power enures to the benefit of every individual interested in its performance. *Dartmouth College v. Woodward*, 4 Wheat., 637, 658. Cooley Const. Lim., p. 248.

From this obligation to the state creating the corporation, results the duty to that sovereignty (among other corporate duties) to allow a stockholder the right, when such right clearly exists, to make an inspection of corporate books, papers, etc.

For a failure of the corporation duly to exercise its franchises and functions, and fulfill its obligations to the state creating it, the law has provided two extraordinary remedies, viz: Mandamus to enforce specific performance, and quo warranto to compel a forfeiture of the franchises and a dissolution of the corporation for non-performance of corporate duty.

Mandamus is the proceeding employed in the exercise of the sovereign supervisory power over the agencies created and empowered by sovereignty for the promotion of the public welfare, to compel these to fulfill the ends of their creation.

The people of the sovereignty creating and empowering these agencies, are necessarily interested in seeing that they fulfill the ends of their creation, and do not abuse the powers and franchises with which they have been entrusted, and hence this proceeding should be always in the name of that particular people or State. In England this supervisory power resides in the Court of King's Bench, and in this State in the Superior Court exclusively.

"In England," says Chief Justice Taney, in 1838, speaking prior to the common law procedure act of 1854, in *Kendall v. United States*, 12 Peters, 629, "the writ of mandamus can be issued by the Court of King's Bench only. It can not be issued by the Court of Common Pleas, or any court known to the English law, except the Court of King's Bench. Its peculiar powers are clearly stated in 3 Black. Com. 42, in the following words: "The juris-

diction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the Kingdom. It commands Magistrates and others to do what their duty requires in every case where there is no other specific remedy,'" etc. "It is from this high and transcendent jurisdiction that the Court of King's Bench derives the power to issue the writ of mandamus, as appears from the same volume of Blackstone's Commentaries, p. 110. These peculiar powers were possessed by the Court of King's Bench, because the King originally sat there in person, and aided in the administration of justice. According to the theory of the English Constitution, the King is the fountain of justice, and where the laws did not afford a remedy, and enable the individual to obtain his right by the regular forms of judicial proceedings, the prerogative powers of the sovereign were brought in aid of the ordinary judicial powers of the Court, and the mandamus was issued in his name to enforce the execution of the law. And although the King has long since ceased to sit there in person, yet the sovereign is still there in construction of law, so far as to enable the Court to exercise its prerogative powers in his name; and hence its powers to issue the writ of mandamus, the nature of which Justice Doddridge, in *Awdley v. Joy*, Popham 176, so forcibly describes by calling it extra judicial, and one of the flowers of the King's Bench. It is, therefore, evident that, by the principles of the common law, this power would not be incident to any court which did not possess the general superintending power of the Court of King's Bench, in which the sovereignty might, by construction of law, be supposed to sit, and to exert there its prerogative powers in aid of the Court, in order that a right might not be without a remedy." "The English common law was adopted in the Colony of Maryland and the courts of the province formed on the same principles. * * * * * * In other words, the general court was in the State of Maryland, after the Revolution, precisely what the Court of King's Bench was in England. *Runkel v. Winemiller*, 4 Harris and McHenry, 449. This case was decided in 1799, in the General Court, and it shows, most evidently that the power of issuing the writ of mandamus

was confined to that Court, and was derived from its King's Bench powers of superintending inferior courts and jurisdictions in the execution of the law, and that this power was not possessed by any other court known to the laws of Maryland."

And again in this same case of *Kendall v. United States*, 12 Peters, 621, Mr. Justice Thompson, in delivering the opinion of the Court, said: "The theory of the British Government and of the Common Law is, that the writ of mandamus is a prerogative writ, and is sometimes called one of the flowers of the Crown, and is therefore confided only to the King's Bench, where the King at one period of the judicial history of that country, is said to have sat in person, and is still presumed to sit. And the power to issue this writ is given to the King's Bench only, as having the general supervisory power over all inferior jurisdictions and officers, and is co-extensive with judicial sovereignty. And the same theory prevails in our State governments, where the Common Law is adopted, and governs in the administration of justice; and the power of issuing the writ is generally confided to the highest Court of original jurisdiction."

It is true that Judge Taney subsequently in 1860, in *Kentucky v. Dennison*, 24 How., 97, said: "The right to the writ of mandamus, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable." This expression was used in a case before the United States Supreme Court and was correct so far as respects the use of the writ in the Federal Courts. In *Commissioners of Knox Co. v. Aspinwall et al.*, 24 How., 384, decided subsequently to *Kentucky v. Dennison*, the Court say: "By the common law, the writ of mandamus is granted by the King's Bench, in virtue of its prerogative and supervisory power. The courts of the United States cannot issue this writ by virtue of any supervisory power at common law," &c. And in *Kendall v. United States*, 12 Peters, 621, the Court say: "To consider the writ of mandamus in use here, as it is in England, the issuing of it should be confined to this Court as it is there to the King's Bench. But this power is not exercised here as in England by the King's Bench, as having a general supervisory power over inferior courts," &c. The said language of Judge Taney, moreover, was

used after the English common law procedure act of 1854 had conferred mandamus jurisdiction upon all the Superior Courts in that Kingdom, and had entirely revolutionized the practice and procedure in its exercise. "The effect," says High, "of this sweeping enactment has been to place mandamus proceedings upon much the same footing as ordinary personal actions, and although the statute expressly preserves the jurisdiction of the King's Bench as formerly exercised, its necessary result would seem to be the almost total annihilation of the prerogative features of the remedy, reducing it to a personal action for the protection of individual rights." High Ex. Rem., Sec. 28. While Judge Taney's expression, consequently, may be applicable to the use of mandamus in the Courts of the United States and in the Courts of England since the recent changes there, yet it can not properly apply to its use in this, or other States where the common law theory of its employment (as formerly in the King's Bench) has always prevailed and not yet been altered, or modified by statute, and adjudications to the contrary in any such States, are a virtual assumption of legislative power.

It follows, therefore, that, in some of the earlier settled States of the Union, where the common law is adopted, and where the power to issue the writ is given to one Court only, as having the general supervisory power over all inferior jurisdictions and officers, there mandamus has been used as a prerogative writ, in the supervisory sense, as fully and amply as in the King's Bench in England prior to the modern legislation modifying its use there. That it was so in Maryland has already appeared from Judge Taney's opinion in 12 Peters, 631. It has also been so used in New York and Illinois. High Ex. Rem., Sec. 4, note 1. The same view has prevailed in this State from our earliest colonial period. The writ of mandamus never has been expressly mentioned in any of the constitutions or statutes of this State. Jurisdiction by mandamus has been derived from and as incident to the general supervisory powers originally conferred by statute upon the Supreme Court of this State, and afterwards upon its successor, the present Superior Court, pursuant to the provisions of our existing constitution. These supervisory powers have always been confined exclusively to one Court in this State. They appear to have been

conferred as early as 1726–'36, by the provisions of chapter 54, of volume 1, Delaware Laws, p. 124, which, as modified by the subsequent act of 1760, vol. 1, page 376, and continued under our constitutions of 1776 and 1792 (Hall's Digest, 104), and of 1831, are now in force and contained in Sec. 2, Chap. 92, Amended Code, 564.

That the jurisdiction of our Superior Court by mandamus is the same precisely as that formerly exercised by the Court of King's Bench in England; that it is an exercise of its prerogative and supervisory power, and that this power is derived from the aforesaid provision of section 2, chapter 92, is shown by the uniform current of authoritative adjudication in this State. It has the direct support of Chief Justice Bayard, delivering the opinion of the court in 1840, in *State v. Wilmington City Council*, 3 Harr., 299, and also of Judge Harrington in the same case, 307. Also of Chief Justice Gilpin in 1864, in *Cannon et al. v. Janvier et al.*, 3 Houst., 31. Also of Chief Justice Comegys in 1880, in *State ex rel. Ferris v. Knight et al.* (not yet reported.) These were cases adjudicated in the Superiour Court. But this view has also the sanction of this Court of last resort in this State. For, in *Knight et al. v. State ex rel. Ferris*, before this Court on error in 1882, Chancellor Saulsbury, delivering the opinion of the Court (not yet reported) said: "The office of the writ of mandamus is to compel a corporation, an inferior court, or a public officer to perform some particular duty incumbent upon them which is imperative in its nature, and to the performance of which the relator has a clear legal right." "The remedy is extraordinary, and if the right is doubtful, or the duty discretionory, or if there be any ordinary and adequate specific legal remedy, this writ will not in general be allowed." "In England it is considered to be a prerogative writ, and was so called because the power to issue it was vested in the judges of the King's Bench, the Court in which the sovereign is supposed to be personally present. It is a remedial writ, the appropriate functions of which are the enforcement of duties by officers and others, who either neglect or refuse to perform their duty, and for the enforcement of which duties there is no other specific legal remedy." * * * "The Superior Court exercises jurisdiction in respect to all matters purely legal, whether of

Common or Statute law, the exercise of which is not vested in tribunals, and being the highest Common Law Court in the State, it has the only authority in this State to award the Common Law writ of mandamus, an authority designed to be supervisory over all inferior legal tribunals, corporations and persons bound to the proper discharge of authority with which they have been clothed by law for the public benefit." Pamphlet opinion, 4, 6.

The effect of this uniform current of adjudication, by our most eminent judges in our highest Courts here, is conclusively to establish that, in this State, until it shall be modified, as in England, by legislative authority, mandamus is a prerogative writ in the supervisory, though not the regal sense—a writ of sovereignty, not a royalty; that it is issued by our Superior Court, not of course, but only in the exercise of a sound judicial discretion, and employed precisely as in the Court of King's Bench in England prior to the statutory modifications there, and in the exercise of an "authority designed to be supervisory;" and that it properly can be employed only against inferior legal tribunals, corporations and "persons bound to the proper discharge of authority with which they have been clothed by law for the public benefit"—that is, persons standing not in a private relation, but in some relation to the public, having a public trust and duty to fulfil and therefore having, in that sense, the status of a public officer. This being so, mandamus can not, appropriately, or lawfully be granted by our Superior Court against any such tribunal, corporation or person, whose powers and duties have not been conferred and imposed by some exercise of the sovereign power of this State.

With respect to its employment against private corporations, in particular, this doctrine is peculiarly applicable. As heretofore stated, a private corporation in this country is created exclusively by statute. Its creation is an act of sovereignty conferring upon specified individuals a portion of the sovereign power for some supposed public good, and which powers they enter into an implied obligation to the sovereign grantor to exercise preliminary in the interest of the people of that particular sovereignty or State, in consideration of its corporate grant. In this and other States, this supposed promotion of the public welfare, in theory at least, is the only legitimate ground for this exercise of legislative authority and

grant of sovereign power to the corporators for the purposes of private incorporation. It is therefore manifest, since such corporation and the State creating it are the only parties to this obligation, that the duty to fulfil it is due solely to that State, and that the right to superintend and enforce its fulfillment belongs to that particular sovereignty alone. Mandamus, then, being the appropriate writ of sovereignty for this supervisory purpose, and the ground and object of its use being to remedy the abuse of franchises conferred by sovereignty, it can only be issued, when invoked against a private corporation, in the name and by the authority of the State which created the corporation, and to which State is exclusively due its obligation to duly exercise its powers and functions so as to promote primarily the public good of the people of that State in fulfillment of the design which that particular sovereignty had in creating such corporation; and this is true whether the writ be invoked by the legal officer of the State, to enforce the obligation in behalf of the public generally, or sought by a stockholder of the corporation, to compel the performance of a corporate duty which may result from this obligation to the State, and so enure to his private benefit. And this principal is equally applicable whether the stockholder is a resident or non-resident of the State of the domicile of the corporation. In either case the stockholder voluntarily and, in legal presumption, knowingly submits himself to the operation of this legal principle when he becomes a member of the corporation.

The approved definitions of the nature and use of mandamus, as formulated by Courts and text writers of high authority, must be understood as applicable only when the writ may be invoked against a private corporation or its officers within the State alone whose legislature has incorporated it, or imposed the duty sought to be enforced. For these definitions do not properly apply when the writ is sought elsewhere, and the assumption that they do must necessarily lead to erroneous conclusions.

The precise question now under consideration does not seem ever to have been adjudicated in the Courts of England. Certainly no decisions relating to it were present at the argument, and it was said that none could be found in the English reports. Considering how numerous are the corporations transacting business in England

of foreign creation and domicile, the absence of any application to an English Court for a mandamus against any such corporation is certainly significant, if not conclusive of its inapplicability thereto.

In this country there is almost as significant an absence of such applications, excepting where such use of the writ has been authorized by statute. In but two of the thirty-eight States of the Union, has the question been the subject of judicial consideration, and, in both, the right to the writ at common law and in the absence of a statute authorizing such use, against a foreign corporation, was denied. The first instance was in the case of *People ex rel. Jenkins v. The Parker Vein Coal Co.*, 10 Howard, N. Y., Practice Rep., 543, where the relator asked for a mandamus to compel the defendants to open the transfer books of the corporation to the relator and to all such stockholders as may desire to transfer stock. In his opinion in that case Mitchell, J., remarked: "The mandamus partakes of the character of a public writ, one in which the people are in some way interested; and it has never been allowed except for the purpose of controlling those owe a public duty to the State in which it issues. This company is incorporated in Maryland, and although it has an office here and may be used here on its contracts and obligations to individuals or others, yet it does not owe allegiance or public duties to this State, or according to the laws of this State, but to the State of Maryland and according to the laws of that State. If it violates its character the remedy should be in Maryland and not here." This New York case is entitled to the greater consideration here because mandamus is regarded in that State, as has been shown, as a prerogative writ in the supervisory sense; which view is in harmony with the King's Bench theory and practice respecting the writ that has also prevailed in this State.

But the case of *Curtis v. McCullough*, 3 Nevada, 202, is a case of especial importance to this inquiry, because in it the question of the common law power of the Courts of Nevada to grant mandamus against the ex-superintendent of a California Mining Corporation, resident in Nevada, to compel him to deliver, to his successor, the mine, books, &c., of the corporation, in his possession in Nevada, came directly before the court for its adjudication. The court held that, as the corporation was created, and its duties im-

posed solely by California, neither it, nor its officers as such had any existence in Nevada; that its superintendent was merely its agent in Nevada enforcing his individual right to be such agent against the ex-superintendent, who was also merely an unofficial person withholding the right; and that therefore mandamus was not allowable, in such a case, at common law, but only by virtue of the express terms of a Nevada statute. In their opinion the Court say: "No judgment can be rendered here which will bind the corporation; this proceeding is simply between individuals over whom the Courts of this State have jurisdiction, but who claim their rights from a corporation;" and the mandamus was accordingly awarded against the respondent as an unofficial person merely, and not under authority of any common law power, but exclusively under a statutory authority which the Court expressly to be "broader than any common law power." And yet this case was cited and much relied on, in behalf of the relator, at the argument.

Again, if private corporations can only be created by the legislative power in a State, for a public purpose in theory, are they not therefore, in a legal sense, the agents or instrumentalities of that sovereignty, exercising a portion of the sovereign powers for the benefit of the people of that State, and therefore a part of its internal administration and domestic concerns? If so, then the right asserted by the relator in this case, to have a mandamus here to procure the books, contracts, etc., of a foreign corporation for the purpose of making inspection and copies thereof, if allowed, might greatly hinder and obstruct the conduct of the business of the said corporation and damage its interests, as the respondent in his answer alleges, and without denial by the relator, that it would. In that case the allowance of the mandamus here would be an interference by this State with the internal administration and domestic institutions and concerns of another State; for if it be conceded that, by such a proceeding, the books, contracts, etc., of a foreign corporation can be held for an instant, then they can be held indefinitely and so prevent the due performance of its functions and duties and the fulfilment of the public objects for which it was created. In the absence of a statute of Delaware authorizing such a use of mandamus by our Court, as a condition of the

enjoyment by such foreign corporation of the comity of our State, this would surely be an unlawful use of our writ and an unwarranted exercise of judicial power! In this county, under our American system of government, it is a fundamental doctrine that the Federal Courts cannot interfere by mandamus with the administration of the internal concerns of a State; 24 How., 107; nor can one Sovereign State of the Union with those of another State: I Kent Com., 462; nor can a State with the administration of the Federal government; 6 Wheaton, 599. It is a presumption of law, therefore, that the Courts of one State will not assume jurisdiction by mandamus, in the absence of clear statutory authority conferring it, to enforce the corporate duties of a foreign corporation and thereby interfere with its due fulfilment of the primary object of its creation, viz., the promotion of the public good of the State of its domicile.

And here the pertinent inquiry arises: Does not the true construction of said Section 2 of Chapter 92 of our Code, from which the supervisory jurisdiction of our Superior Court by mandamus is derived, negative any claim of power to exercise it against a corporation, or its officers or agents, unless such corporation has been incorporated, or the duty sought to be enforced has been imposed by some statute of this State? So far as this supervisory jurisdiction relates to magistrates and other officers it is limited and confined by our statute to such as are "within this State," to quote the precise words of said Section 2, that is, to such officers only as are created, or whose duties are imposed by this State alone. And so far as such jurisdiction over corporations is derived from said Section 2, it must likewise, in principle, and, presumably, in the intent and meaning of those who enacted it, be confined to such corporations as are created, or whose duties are imposed by this State exclusively. For the law is definitely settled that a corporation can have no legal existence outside the territorial limits of the sovereignty which created it. Nor can its officers be recognized in their official character out of the jurisdiction of the State which created the corporation, but only as are the agents of a natural person residing in another State. *Custis v. McCullough*, 3 Nevada, 202; *Bank of Augusta v. Earle*, 13 Peters, 519, 588; *Paul v.*

Virginia, 8 Wallace, 181; *Railroad v. Koontz*, 104 United States, 11; *Field on Private Corporations*, sections 25, 243, 244.

It is equally well settled that a foreign corporation does not become a corporation of another State than that of its creation and domicile, by holding real or personal property or transacting a portion of its business therein. *Railroad v. Koontz*, 104 United States, 10, 13; *B. & O. R. R. Co. v. Carey*, 28 Ohio State, 208: *Blackstone Manufacturing Company v. Inhabitants of Blackstone*, 13 Gray, 488.

It is not sufficient for the purposes of his case, for the relator to urge that because a foreign corporation, by the comity of this State, holds property and transacts business by its agent here, therefore it is subject to our writ of mandamus. It may be true that such a corporation may thereby be served with our process, or attached, and its property real and personal within our State, made liable to execution in actions upon its contracts made in or out of Delaware. But to contend that, therefore, it, or its agents, or its property are subject to our writ of mandamus for non-performance of a corporate duty not imposed by our laws, is to lose sight of the distinction between an action on contract and a mandamus proceeding. The former is employed to recover satisfaction for the non-performance of an obligation touching a private interest, and due primarily to the person interested, while mandamus is a writ of sovereignty to compel the specific performance of an obligation touching a supposed public interest and due primarily to the State, and therefore employed exclusively by that sovereignty to which alone the obligation is due, whether invoked by the proper law officer of the State in the public behalf, or by some person having a private interest in its performance. When it is employed to enforce a corporate duty arising out of such an obligation to sovereignty, (and the duty to allow inspection and copies of corporate books, papers, etc., when it exists, is such a corporate duty), it must, therefore, be issued exclusively by the State creating the corporation or imposing the corporate duty. Without a corporation there can be no corporate duty. In Delaware a corporation can be created only by authority of a statute enacted in the prescribed constitutional manner. Here, it cannot be created by comity. Otherwise a foreign corporation, holding property, and

transacting business by its agents in our State, by our comity, (which is merely the voluntary permission of the State to do so subject to its views of sound public policy), could not be excluded and denied that privilege whenever our State policy might require this, notwithstanding that the right of the State to do this is established by undoubted authority. *Paul v. Virginia*, 8 Wallace, 181. For, if by mere comity it could become a corporation of our State, and, like other domestic private corporations here, under obligation to the State as such, to perform its corporate functions and duties, then under the "contract" doctrine of the Dartmouth College case, 4 Wheat., 518, it could not be so subjected to such exclusion and denial. Accordingly, it is manifest that a foreign private corporation by holding real and personal property and transacting business as such within this State, by the comity of Delaware, does not "submit or subject itself to the law of the State in the same man- and to the same extent, in respect to such property and business, as it would be bound to do were it a corporation created by the State of Delaware, or owe obedience and subjection to the mandates of its Courts in these respects as fully as if it were a domestic corporation," (as the majority opinion of this Court asserts) so far, at least, as respects the use of our writ of mandamus against such foreign corporation. Therefore, where a duty is sought to be enforced against a foreign corporation or its agents by mandamus in this State as a corporate duty (and it is sought as such in the pending case) it must appear to have been imposed by a Delaware legislative enactment incorporating such foreign corporation or imposing the duty as a condition of its enjoying the comity of our State.

A corporate duty, as such, does not exist, or arise "by common law" in this State, or elsewhere in this county, but only by statute, nor does the right to inspect, or have copies of corporate books, papers, &c., or any other rights springing from corporate duty. Since all the powers and duties of a private corporation created under and by virtue of a legislative enactment, (as the said Diamond Match Company has been, in Connecticut exclusively,) are derived from the statutory grant of such powers, the duty to allow such inspection and copies, and the corresponding right to have it performed, when these exist and are not expressly mentioned in the statutory grant, are, according to common law rules of inter-

pretation, impliedly contained in such grants as necessary incidents to the due and proper fulfillment of the ends for which the corporation was created. Such right of inspection, etc., is, therefore, not a common law right, found outside of the statutory enactment conferring the corporate powers, etc., but within its terms and their true meaning and import as legally ascertained by means of common law rules of construction. *Bank of Augusta v. Earle*, 13 Peters, 587.

Accordingly it is evident that neither a foreign corporation, as a corporation, nor its officers, as corporate officers, can have existence in Delaware by comity, or otherwise than by appropriate legislative enactment here; and further that no corporate duty, whether to allow a right of inspection, etc., to a stockholder, or other right, can be due from a foreign private corporation, or its officers or agents, as a corporate duty by the common law of Delaware. The present proceeding, as the record shows, is to enforce a corporate duty, as such, against a corporate officer, as such, and when the officer and the duty (if it exists) have existence solely by force of a Connecticut statute. It is not a proceeding on the part of the relator to require the respondent to perform a duty due by him as a person, in his individual capacity merely, but as the president of a foreign corporation and in his official capacity entirely.

But it has been insisted that, since the said respondent resided in Delaware, and had the needed books, etc., in his possession here, the Court below had jurisdiction of the *custos* and the *res*, and, therefore, it might lawfully award the mandamus to compel the respondent to allow the required inspection and copies thereof. But since it has been shown that neither the said corporation is a corporation, nor the respondent a corporate officer thereof, in Delaware, and that the said duty sought to be enforced is not a corporate duty arising either at common law, or under any statute of this State, it follows that it must be a duty due from the respondent as a person, and in his individual capacity, and not as an officer of said corporation. But the present proceeding is against him as president and officer, and not as an individual merely, and to perform a corporate duty and not an individual duty, and hence the claim on this ground is at variance with the alleged right as claimed of record.

But even if it might properly be claimed, in the pending proceeding, under the present state of the record, as a mere individual duty, because the respondent resides here and has the needed books, etc., within the jurisdiction, yet, in the absence of a statute authorizing its use for this purpose, the writ would not be allowable in view of the theory and principles heretofore stated. *Custis v. McCullough*, 3 Nevada, 202. It might as well be contended that the writ could lawfully be awarded to compel the agent of a non-resident individual or partnership manufacturer to allow inspection and copies of such manufacturerer's books, etc., in his charge, when required for purposes of evidence in a suit.

A foreign corporation, having no existence without the limits of the State of its creation, neither it, nor its officers, qua officers, can be present in Delaware. Its agents are here as individuals merely, and while its property here may be subject to execution in satisfaction of contracts made, or torts done here by its agents, neither the corporation nor its agents are liable to our mandamus to enforce for the benefit of either a resident or non-resident of Delaware, any right arising from any of its corporate duties; for these are obligations due only to the foreign State which created it, and, therefore, although there may be jurisdiction over the *custos* and the *res*, for the purposes of actions *ex-contractu* and *ex-delicto*, there is none over the corporate duty, as there must be to warrant mandamus in this State, either at common law or under our existing constitution and legislation.

This conclusion rests upon legal theories and principles which are so familiar as to seem fundamental. To these both private corporations and the writ of mandamus owe their origin, and by these they must be recognized and governed in dealing with them. These furnish the reason for the existence of the former, and the ground for the application of the latter as the appropriate remedy for enforcing the obligations of such corporations to the State of their creation. And these, too, furnish the ancient lines of demarcation which separate and distinguish this form of remedy from all others. Disregard or destroy the distinguishing marks which indicate the established and familiar boundaries of this, or other forms of remedy, and hopeless confusion must prevail, and both lawyers and Courts become embarrassed by perplexing uncertainties.

Desirable as it may be liberally to extend and adapt the ancient rules and remedies of the law to the needs of modern change and progress, yet to attempt this when it inevitably leads to their transformation, or disfigurement beyond practical recognition or identification is unwarranted as it is illogical.

Apply our writ of mandamus to a case like the pending one, and its distinctive character and limitations will be discarded, and it may then issue as well against a private person or partnership as against a public officer or a corporation; and as well to meddle with private affairs as to superintend the public interests. The plea of supposed hardship or inconvenience may possibly induce legislative, but it should not judicial enactment in this behalf. In its use of mandamus the Court of King's Bench in England, notwithstanding its "high and transcendent" supervisory jurisdiction, kept strictly and faithfully *super adequas vias* of the Common Law until a departure therefrom was authorized by legislative enactment, and the Superior Court in this State should do likewise.

To extend this investigation further is needless. In my judgment, it has conclusively demonstrated that the Superior Court, in Delaware, has not jurisdiction by mandamus over a private incorporation of exclusively foreign creation, its officers or agents, to enforce the performance of a corporate duty not imposed by any statute of this State, until our Legislature has, by further enactment, conferred such jurisdiction. In the absence of such legislation, therefore, the judgment of the court below awarding the peremptory writ was erroneous and unauthorized.

SUPERIOR COURT,

FALL SESSIONS,

1886.

BENNETT GOLDSMITH, defendant below, appellant, *v.* ROBERT GREENLY, plaintiff below, respondent.

Sale—Price payable other than in money—Demand.

The purchase price of articles, which by the contract of sale was to be paid for in goods, cannot be recovered in an action for the same unless the goods were demanded, and unless the contract was declared on specially.

A contract of sale generally implies that the price thereof is to be paid for in money.

(*Sussex, 1886.*)

This was an appeal from the decision of a Justice of the Peace, before whom the action was brought to recover the amount due for some pine piling sold and delivered by Greenly to Goldsmith.

The plaintiff below testified that he was to receive one dollar and fifty cents each for piling thirty feet long, and one dollar and seventy-five cents each for piles fifty feet in length.

Goldsmith testified that the piles were to be paid for in store goods, he being a merchant and agent for the railroad for the purchase of all kinds of piling, from whom he received in cash only the price paid the plaintiff. His daughter, who was acting in the capacity of clerk, and was present when the contract was made with Greenly, testified that he (Greenly) was to receive goods and a little money in payment for the piling.

Alfred P. Robinson, for the defendant, contended that if the

contract was that the piling were to be paid in goods or merchandise it was a special contract and should have been declared on as such, and not in indebitatus assumpsit on a contract to pay for them in money, or at their cash price or value, quoting in support thereof, 2 Houst., 556; 1 C. Pl., 346 and 13 Mass., 496.

Charles F. Richards, for the plaintiff, admitted the contention of the defendant, but contended that the original contract to that effect was afterwards rescinded by the parties.

COMEGYS, C. J., charged the jury:

In a contract to sell and deliver piles at a stated price without specifying in what it is to be paid, the law implies and imports that it is to be paid in money. But if the contract was that the price was to be paid in goods, then it was a special contract and should have been declared on specially, and the plaintiff below cannot recover unless he had demanded the goods. If, however, they were to be paid for in money, then he is entitled to recover the amount claimed.

Verdict for the defendant.

CALEB H. BRADLEY *v.* BENJAMIN KENT'S EXECUTOR.

Administration — Husband and Wife — Witness — Notice of Claim to Executor.

The wife of an executor cannot testify in a suit wherein he is a party.

The law does not imply a promise for payment of board as between near relatives, as father and child, and in order to recover for the same there must be an express promise proven.

There being no order by the Register of Wills requiring the executor to advertise the grant of letters testamentary, notice in writing of a claim against the estate was not necessary; but notice, though not in writing, before final account was passed and distribution of the residue is sufficient.

(*New Castle, 1886.*)

ASSUMPSIT for the board of Benjamin Kent, deceased, and his wife, on the express promise to pay out of his estate for the same.

The plaintiff's wife was a daughter of the deceased. The promise was to pay in his lifetime if he was able, and if not, out of his estate after his death if he left enough to pay it.

Anna B. White, testified, am a daughter of the plaintiff by his first wife. Benjamin Kent and wife lived at my father's house during the years 1877, 1878 and 1879. They lived very comforably and such board was worth five dollars per week.

Moses Rambo, sworn: Was witness to the following instrument which was signed by Benjamin Kent.

"9th mo. 23, 1878.

"Since our residence has been with Caleb and Anne Bradley we have not paid them anything on account of our board, they being willing to wait on us and to allow payment depend on our means. We hope to be able to pay them, but should they not be paid in our lifetime, I promise that they shall be paid with interest out of my estate, if sufficient estate is left.

BENJAMIN KENT."

Attest,
MOSES RAMBO."

Benjamin Nields, for the defendant, moved a non-suit on the ground that it appeared from the evidence that the action was not commenced within three years after the cause of it accrued, the act of limitations being pleaded.

THE COURT overruled the motion for a non-suit.

Patience W. Kent testified: Am wife of the defendant—.

Counsel for the plaintiff objects to her competency for that reason.

Counsel for the defendant replied that the defendant was sued as executor, or as a trustee, and as such the relation of a wife to him could exist between him and the witness.

THE COURT sustained the objection and excluded the testimony.

Henry S. Kent affirmed: I am the defendant. I never had any notice or knowledge of the written agreement or promise

of Benjamin Kent to pay for board, until after I had, as executor, passed my distributive account on his estate.

Evidence denying the genuineness of the signature "Benjamin Kent" was offered.

Anthony Higgins and *George H. Bates*, for the plaintiff:

Benjamin Nields, for the defendant, asked the Court to charge the jury as follows:

That Benjamin Kent's promise to pay was a promise to the Bradleys, jointly, and that as Anne had died, no action could be brought by the survivor, individually; that the plaintiff in his bill of particulars, had made no reference to the written promise, it could not, therefore, be considered; that the law does not imply a promise on the part of Benjamin Kent to pay board to a son-in-law; that even if the jury be satisfied that there was an express promise, but there had been no notice of the claim to the executor until after the estate was closed, no judgment can be rendered against the executor; that the letter of the plaintiff to B. Lundy Kent, dated July 20, 1882, was not notice to the executor; that if the jury be satisfied that the signature of Benjamin Kent is genuine, then the claim is barred by the statute of limitations.

COMEGYS, C. J., charged the jury:

The promise was a promise by both parties and that as the wife had died the plaintiff could bring suit for himself and wife: Where an action is on a paper writing and is also on general counts no special agreement is necessary: The law does not imply payment of board where the relative is intimate, as for instance, between a father and child; there is no proof before you in this case that any order had been made by the Register of Wills requiring the executor in this case to advertise the grant of letters testamentary to him on the estate of Benjamin Kent, deceased, as provided for in the second paragraph of Section 41 of Chapter 89, Revised Code, 550, 551, and therefore the provisions of third paragraph of the said section could have no application to this case, and consequently notice of the claim in writing was not necessary in this case. It was sufficient in this case if the executor had notice of the claim before the final account was passed and the residue was

distributed, without its being in writing. The question of the genuineness of the signature lies with the jury and if they believe the signature is not genuine, then the claim is barred by the statute of limitation.

Verdict for the plaintiff.

SAMUEL D. FORBES *v.* JAMES MARTIN, Sheriff.

Conditional Sale—Proof—Replevin—Previous Demand.

A conditional sale of goods and chattels is valid, and the burden of proving it rests on the plaintiff.

In an action of replevin against a sheriff for levying upon goods which had been sold to the present owner upon conditional sale, no proof of a demand by the plaintiff and refusal by the sheriff to deliver the goods to him was necessary.

(*New Castle, 1886.*)

REPLEVIN for one hub lathe, one spoke lathe and one tenon machine and fixtures of the value of four hundred dollars, *Pleas non cepit*; and that the said goods were the goods of Forbes and Banks, and not of the said Samuel D. Forbes.

Samuel D. Forbes, plaintiff, testified: Seven years ago I was in the business here of manufacturing spokes and wheels, and owned and used the said lathes and machinery in that business. In April, 1884, Forbes and Banks came to me and wanted to buy them. Banks said, after we had agreed on the price, that he could pay the money for them, but would like to have time on them. I told him I was not willing to trust them, but would let them have the use of them until they paid for them, receiving two notes, one at four months for two hundred dollars, and one at six months for two hundred and fifty dollars, and also the following agreement:

"WILMINGTON, April 25, 1884.

"This may certify that the Spoke, Lathe & Tennon Machine that we borrowed are to remain the property of S. D. Forbes until we have paid the two notes which we have this day given, one

for two hundred at four months and one for two hundred and fifty dollars at six months, and further, we are to let Mr. Forbes have four sets of good wheels valued at twenty-five dollars, and when we have done this the machines together with a hub lathe are to become ours, and Mr. S. D. Forbes is to give us a bill and receipt for them in full, but until we have fulfilled on our part as agreed the machines are to remain the property of S. D. Forbes.

FORBES & BANKS."

$200 in 2 mo.
$250 to be paid in 6 mo."

"April 25th, 1884.

Received of Forbes & Banks, two notes one at four months for two hundred dollars and one at six months for two hundred and fifty dollars, which when paid will be in full for a spoke lathe and Tennon machine and parts sand belt and hub lathe.

S. D. FORBES."

At that time I had no knowledge whatever that they were embarrassed in their business, or that any execution had been issued against them and was then in the hands of the sheriff. They have not paid me anything on the notes, when I learned that the sheriff had levied on the machines, I went to him and told him that they belonged to me and were my property and told him about the agreement, and demanded them of him as my property, but he declined to surrender them to me, and advised me to sue out a writ of replevin for them.

After other evidence in support of the above, William Ford testified: Was one of the members of the firm of Forbes and Banks, and made the agreement in writing with the plaintiff and signed the name of our firm to it. I told him before I did it that our goods had been levied on and it was not drawn by him or signed by me until after the first levy had been made on our property, but before the second levy had been made on them. The first was made on first day of May, 1884, and the second on the twelfth day of that month.

William C. Spruance, for the plaintiff: This was a conditional

sale and in such a sale the ownership of the goods does not pass to the purchaser until performance of the condition.

Davis (*Benjamin Nields* with him) for the defendant:

There was no proof of a demand and refusal in this case, 1 Houst., 605; *Truax v. Parvis** (Kent Co., April Term, 1886), 3 Houst., 63; 5 Houst., 192. There was an absolute and not a conditional sale when the goods were delivered to the purchaser in this case, and the conditions afterwards sought to be affixed to it by a further agreement between the vender and purchaser after the goods had been levied on at the suit of their creditors, was merely an afterthought and was fraudulent and fraud is against them, and could be no avail to defeat the original and absolute sale and revest the ownership of the goods in the vendor.

Spruance, in reply, quoted 5 Houst., 192; I do not deny that if it was originally an unconditional sale, and the goods were afterwards levied on as the property of the purchaser at the suit of a creditor of theirs, and the terms of the conditional sale were not agreed on by the parties to the contract of sale until after that, it could have any effect to qualify or render it a conditional sale as against such a creditor. But it was a conditional sale. On the day when the goods were sold and delivered and before any execution was levied on them, then the purchasers could have had no property or ownership of the goods when they were levied on, and the taking of them under it was wrongful against the plaintiff, the owner of them, and no demand and refusal was necessary in the case. 7 Gray, 155; 3 Cush., 257.

COMEFYS, C. J., charged the jury:

That the case turns upon one question, and that a question of fact to be ascertained by the jury, viz.: did the goods or the property in question belong to the plaintiff at the time when they were levied on by the sheriff as the goods of Forbes and Banks. You must recognize the validity of a conditional sale of goods and chattels when it is proven, and the burden of proving it rests on the

*NOTE.—See page 330 current volume.

plaintiff in this case. If you are satisfied from the evidence that the property in question belongs to the plaintiff at the time of the levy, then your verdict should be for him. No proof of a demand by the plaintiff and a refusal by the sheriff to deliver the goods to him was necessary.

Verdict for the defendant.

Henry W. Stewart *v.* George S. Grier.

Arbitration by Submission—Award—Avoidance—Costs.

When by consent of parties their controversies, including all matters of account, claims, debts, or demands which they may have against each other and then in dispute, are submitted to arbitrators selected and agreed upon by them without a rule of reference out of court, the arbitrators thus appointed are the judges of all items in controversy whether legal or equitable, and both parties are bound in law by the award, unless there be good grounds shown for avoiding the same.

In such an arbitration any matter in question in the nature of a partnership account between the parties is subject to the determination of the arbitrators.

The award of arbitrators in such a case, when by the terms of the articles of submission, if it was made within the time limited it should be final and conclusive, will be confirmed by the court, unless good cause be shown for avoidance.

Any material error or defect apparent on the face of such an award as misconduct or mistake of the arbitrators in making their award in such a case may not be shown in bar of an action at law for nonperformance of the award, but the remedy must be pursued in equity.

The failure of the arbitrators to be duly sworn or affirmed before proceeding in the arbitration will vitiate the award.

The parties to arbitration having bound themselves in a certain sum to abide the award, said sum is in the nature of a penalty and no greater amount can be collected than the amount specified in the award with interest from the date of the award.

The power of awarding the costs of the arbitration was necessarily incident to the authority conferred on the arbitrators, though not mentioned in the articles of submission. Comegys, C. J., dissents.

(*Sussex, October 12, 1886.*)

Action of Debt on an arbitration bond.

After the plaintiff rested counsel for the defendant moved a non-suit on the following grounds: First, because by the terms of

the agreement to submit their differences to the said arbitration, the plaintiff agreed to discontinue the suit he had already instituted in this Court against the defendant which he has not done. Second, that the arbitrators were within twenty days after the hearing to report in writing. Third, that it was not proved that Mr. Evans was appointed by the other two arbitrators to act as an arbitrator with him. Fourth, there was no proof that the arbitrators were sworn.

THE COURT refused the motion for a non-suit.

James R. Lofland and *Charles M. Cullen*, for the plaintiff:

Charles F. Richards and *Jacob Moore*, for the defendant:

HOUSTON, J., charged the jury:

That the law was favorable to the arbitration and this method of determining legal controversies and disputes out of Court by the mutual consent of the parties to submit them to the arbitration of persons agreed upon between them, and when it is done without a rule of reference out of Court, or any intervention by the Court, as in this case, the arbitrators become the judges and the tribunal of their own selection and creation for this purpose, and for that reason, unless there be good grounds shown for refusing to abide by their decision, both parties are bound in law to comply with it, and when, as in this case, the submission to arbitration is of all matters in difference between the parties, it includes all matters of account, claims, debts, or demands, which they may have against each other, and then in dispute and unsettled between them; and as some question was started on this point in the argument by the council for the defendant, we will say that we know of no reason why it should not include any equitable, as well as legal claims or demand then in dispute and unsettled between the parties, since in its nature it is no more a legal than an equitable tribunal created and established by the act and consent of the parties, and not under the constitution or any statutory provision of the State, and, therefore, we think, if under the terms of the submission in this case, there was any matter in question in the nature of a partnership account between the parties submitted with other claims or demands by them, or either of them, to the consideration and determination of the

arbitrators, it was as competent for them to entertain and pass upon it, as upon any other matter of account, claim or demand then subsisting between the parties and submitted to them for their consideration and determination, for the authority and jurisdiction conferred upon them for that purpose, was solely by the will and consent of the parties, and without the intenvention of any Court of law or equity in the State in which such distinctions are observable and constitute an important line of division between this respective jurisdiction, as a general principle.

Not only by the express terms of the submission the award if made within the time limited in it, was to be final and conclusive; but the tendency of modern jurisprudence is to give force, conclusiveness and effect to all awards where there is no corruption or misconduct on the part of the arbitrators, and where no deception has been practiced upon them; such has long been the practice in the Courts of this State. In defence, however, of an action on the award, or for not performing the award, or in defence of an action on a bond conditioned for the performance of the award, and for not performing it, as in this case, the defendant may avail himself of any material error or defect apparent on the face of the award; such as excess of power by the arbitrators; as by omitting to consider a matter submitted, and it is material to the award: or want of certainty to a common intent; or a plain mistake of law, as for instance, as allowing a claim for freight when the ship had never broken ground, and the like. In regard to corruption or other misconduct or mistake of the arbitrators in making their award, the common law seems not to have permitted them to be shown in bar of an action at law for non-performance of the award; but the remedy must be pursued in equity. But in this country, in those States where the jurisdiction in equity is not general, and does not afford complete relief in such cases, it has been held that if arbitrators act corruptly, or commit gross errors or mistakes in making their award, or take into consideration matter not submitted to them, or omit to consider matters which were submitted, or the award be obtained by any fraudulent practices, or suppression of evidence by the prevailing party, the defendant may plead and prove any of these matters in bar of an action at law to enforce the award. In practice where no suit is pending arbitrations are

now generally entered into under the statutes enacted for the purpose of making the submission a rule of court; and in all cases where the submission is made a rule of Court, the Court will generally administer relief whenever it could be administered in equity. Such is the doctrine on the subject announced by Mr. Greenleaf in the second volume of his work on evidence, section seventy-eight, on the authority of the numerous cases cited in his notes to the section in support of it. But the arbitration in this case was not made a rule of Court, and was not intended to be returned to any other tribunal whatever for examination, approval or comfirmation of the award made by the arbitrators; while at the same time it should be observed that we have a Court of Chancery wherein the the jurisdiction in equity is general, and which can afford complete relief in such cases as he refers to. But it is not necessary to pursue this principle or inquiry any further in this case for the submission and the award of the arbitrators are in evidence before the Court and jury, and as there is no material error or defect apparent on the face of the award, such as we have before mentioned and there is no proof of corruption or other misconduct or mistake of the arbitrators in making it; and we must therefore say to you that no such ground appears or has been shown for impeaching or denying the validity and conclusiveness of it.

There is however, another matter on which the counsel for the defendant has asked the Court to charge the jury that if the plaintiff in the progress of the trial failed to prove by the testimony of any witness in the case, to the satisfaction of the jury, that the arbitrators before proceeding in the arbitration, were duly sworn, or affirmed, if they had conscientious scruples against taking an oath, as such to try the case, he could not recover in the action. In response to which the Court would say to them that if in the recollection of the jury there was not sufficient testimony before them to satify them of the fact that before proceeding to the hearing of the case the arbitrators had been so duly sworn or affirmed, the plaintiff could not recover, and their verdict should be for the defendant; but if on the contrary, the jury should be satisfied from any testimony in the case they were so sworn or affirmed to try the case, then their verdict should be for the plaintiff. And this brings us to the question presented by the counsel for the plaintiff

in the argument, if for the plaintiff for what amount the verdict shall be. The agreement to submit the matters in difference between them to arbitration is under the hands and seals of the parties respectively and contains an express stipulation by which each bound himself to the other in the penal sum of six hundred dollars to abide by and perform the award of the arbitrators; and although upon the face of the instrument and in view of the facts proved in this case before us, it is not free from doubt whether the parties intended that the sum of six hundred dollars stated in it should constitute what is termed in law as strictly a penalty, or on the contrary, what are termed liquidated damages. The counsel for the plaintiff have contended for the latter construction, and that the words used must in this case be construed to mean stipulated damages and not a penalty; and yet among the rules of law which have been established on the subject, it has been generally held that where it is doubtful by the language of the instrument whether the stipulation was intended as a penalty or as liquidated damages, the stipulation is to be considered a penalty merely. Besides we do not think there has been anything disclosed in this case to bring it within the principle ruled on this question in the case cited by the counsel for the plaintiff, for we apprehend there could have been nothing in the character of the counter claims, debts and demands subsisting between the parties to this arbitration which could have prevented or seriously embarrassed the arbitrators in fixing the measure by which they were to ascertain and determine the amount of damages to be awarded to the plaintiff, or the actual amount due to him from the defendant on a full and final adjustment and settlement of the mutual accounts and demands of the parties according to the evidence before them. We therefore instruct the jury that the plaintiff cannot recover the six hundred dollars demanded by him as liquidated damages, or more than the sum awarded him by the arbitrators, with interest thereon from the date of the award. Upon the question raised by the counsel for the defendant in the argument whether the arbitrators without any authority conferred upon them for that purpose by the terms of the submission had any power or discretion with respect to the costs of the arbitration or to award among other things, as was done by them in this case, that the costs of the arbitration amounting to

twenty-two dollars and twenty-four cents, should be paid by the defendant, it is proper for me to say that after consultation the members of the Court offer in opinion a majority, however, holding that the power of awarding the costs of the arbitration was necessarily incident to the authority conferred on the arbitrators of determining the cause; and also such a trial by arbitration as this was is not in the matter of the legal costs properly incident to it, is not in terms provided for in our general statute in regard to costs in civil actions, it is certainly embraced in the long established and reasonable rule and policy of it, that "generally a party for whom final judgment is given, in any civil action, or on a writ of error upon a judgment in such action, shall recover against the adverse party costs of suit, to be awarded by the court." According to the broad and comprehensive language of the act. But notwithstanding there is some contrariety in the rulings upon this question both in England and in this country, the better opinion, and the weight of the decisions, especially in this country, the majority of the Court think are in accordance with the principle which I have just announced. *Kyd. on Awards*, 100; *Watt. on Arbitrat.*, 11 Law Libi., 89; 1 Steph., N. P., 151; *Atchison v. Corgey*, 9 E. C. L., 380; *Roe I. Wood v. Doe*, 2 T. R., 644; *Alling v. Munson*, 2 Conn., 691; *Strang v. Ferguson*, 14 Johns, 161; *Dew v. Exton*, 1 South, 173; *Joy v. Simpson*, 2 N. H., 179; *Cox v. Jager*, 2 Cow., 638; *Lewis v. England*, 4 Binn., 5; *Buckley v. Ellmaker*, 13 Serg. & R., 78; *Young v. Shock*, 4 Raudu., 299; *Nicholas v. Ins. Co.*, 22 Wend., 125; *Wood v. O'Kelly*, 9 East, 426. We have therefore only to say to you in conclusion that if you find a verdict for plaintiff it should be for the amount of the award with interest thereon from the date of it and the costs of the arbitration, twenty-two dollars and forty-two cents.

COMEGYS, C. J. The defence to this action is put upon two grounds—First, That no proof was made of any notice to the defendant of the making of the report by the arbitrators; nor that it was made within the time (twenty days) after the hearing, fixed by the articles of submission. Second, That there was no sufficient proof that the arbitrators were sworn, as provided by the articles, before entering upon the discharge of their duties. With respect

to these respective grounds, we say to the jury that the articles of agreement contain no provisions for notice to either party. In the absence of such, no notice was required by law to be given by Stewart to Grier; for in cases of arbitration mutually agreed upon by the parties, each of them is in legal contemplation cognizant of all that takes place; in other words, has notice of the proceedings, or is bound to take notice of them from the beginning to the end. And we further say, in relation to the second ground, that while the statement in the report of the arbitrators that they were sworn (in pursuance of the requirements of the submission), is not in itself sufficient proof of that fact, yet when supplemented by the testimony of a witness who swears to their qualification, there is ample evidence that the arbitrators were sworn. The defendant confidently contends that there was no such supplementary proof; while the plaintiff is equally sure that there was, and that it was made by the arbitrator, Robert H. Davis.

In case of such contention, the question is usually settled by the notes of the Judge trying the case; but we have no notes upon the subject, neither is our recollection clear about it. Therefore, the question must necessarily be submitted to your recollection; and if such recollection be that Mr. Davis said the arbitrators were sworn, there is an end to the controversy, and the second ground of defence to the action fails. Should your minds be satisfied, upon the subject of proof that the arbitrators were sworn, and you find that they were sworn, then your sole duty is to decide upon the amount the plaintiff is entitled to recover from the defendant, for there is no other defence to the action relied on. The plaintiff contends that he has a right to a verdict at your hands for six hundred; while the defendant denies this, insisting that he can recover nothing. If you think he should have a verdict, but the sum of two hundred and two dollars and ninety-four cents found to be due him by the arbitrators. A settlement of this dispute depends upon the nature of this case. Ordinarily a party in whose favor an award is made (I am not speaking of awards on submissions in Court or by statute), is entitled to this amount of it, and also the costs he has incurred. But this is not a case of such award, but that of one made in pursuance of articles of agreement; and as they contain no provision for the payment of expenses, the decision with re-

spect to them is a nullity. If, therefore, you should adopt the defendant's view and confine the recovery to the award and not extend it to the provision in the articles for stipulated damages, the plaintiff can recover nothing but the sum of two hundred and two dollars and ninety-four cents, but by way of damages for the detention of his debt, you may give him and he is entitled to have interest from the making of the award till this day. But the plaintiff insists that he is entitled to recover from the defendant the sum of six hundred dollars, upon the ground that such sum is fixed and agreed upon between the parties in their submission to arbitration, and as for the damages to be recovered each from the other, for a breach of the mutual covenant or agreement in the articles, to pay the sum awarded to be due by the arbitrators. This contention is opposed by the defendant, in whose behalf it is claimed that the verdict in this case (if any be given for the plaintiff) must be limited to the debt, or indebtedness, of the defendant to the plaintiff, as found and reported by the arbitrators. This difference between the parties makes it necessary that we should charge you upon the subject of agreements for fixed, or stipulated damages. It is not a very uncommon thing for parties entering into a contract, especially where the measure of damages for the breach of it would be difficult to ascertain, to stipulate, as they may lawfully do for a certain sum as such measure. When this is done, if suit be brought upon the instrument to recover the damages agreed upon (which are known as stipulated or ascertained damages), and breach of the stipulation be shown, the party complaining of the breach is entitled to a verdict for the amount, provided he has brought proper action therefore, and in the statement of his case, have unequivocally shown that he bases his claim absolutely upon such stipulation. In this case there appears to be two grounds upon which the verdict in his recovery (if you give him a verdict) should not be benefitted by the stipulation for fixed damages. The first is, that it is not in our opinion absolutely certain, as it should be, that the parties intended in this case that the one should recover against the other the full sum of six hundred dollars for the breach of the agreement; for the reason that the sum is characterized in the instrument as well as "penal sum," as "ascertained and liquidated damages." While this in itself, might not be sufficient to fix the

sum as a penalty; yet the form of action adopted is debt, and not covenant, the former not being a fit action for the recovery of damages, however resulting, but the latter the appropriate one where, as in this case, the action is upon a sealed instrument. Besides all this, the form of the breach in the declaration, taking it in its entirety is the same as that used in suits to recover for damages sustained by reason of breaches of the condition of bonds with collateral conditions brought under our statute, the judgment in such cases being for the penalty on account of the forfeiture of the bond. We can not, consistently, instruct you that the plaintiff is entitled to recover the sum of six hundred dollars, in view of the considerations, but sum only of two hundred and two dollars and ninety-four cents, with interest from the date of the award.

Verdict for the plaintiff.

DOE, Demise of ELIHU M. LYNCH, et al. *v.* RICHARD ROE, casual ejector, and ELISHA W. CANNON and GEORGE W. CANNON, tenants in possession.

Ejectment—Adverse Possession—Statute of Limitations—Evidence of Lost Deed.

Possession of real estate, obtained under a contract of purchase, is by consent of the owner until all the conditions on the part of the purchaser are complied with. After performance of all conditions on the part of the purchaser, the possession becomes adverse, and if it so continue for twenty years, the right of the former owner to recover possession is gone.

If the instrument of writing under which possession is obtained does not describe specifically the land to be conveyed, the acts and conduct of the parties in giving and taking possession will be treated as part of the transaction and supply the defect in the instrument.

The act of limitations begins to run when the adverse possession commences, and does not stop thereafter, but continues at the will of the party in possession, unless interrupted by the act of one having a better title.

Where adverse possession begins during the lifetime of the real owner, it does not cease at his death by operation of law, but, if maintained, continues as against all parties claiming by or through him, whether minors, married women, persons of unsound minds or otherwise.

Evidence of a deed having been made for a tract of land, the non-production of it having been satisfactorily accounted for, if believed by the jury, will be sufficient to sustain their verdict.

(*Sussex, October 19, 1886.*)

ACTION OF EJECTMENT for a tract of land situated in Dagsboro hundred. The lessees of the plaintiff claim title as the heirs-at-law of Robert Mumford. The defendants claim title as purchasers at the sale of the lands of Samuel Mumford by order of the Orphans' Court, the said Samuel Mumford having come into possession and entered upon said land by a contract of sale with Robert Mumford, offering in support a receipt from the said Robert Mumford, the original owner, to the said Samuel Munford, dated May 31, 1850, and adverse possession since 1849.

White, for the plaintiff.

Moore & Moore, for the defendant.

COMEGYS, C. J., charged the jury:

Where a party enters into possession of real estate, by the consent of the owner, under a contract of final purchase between them, some one or more of the terms of which remain to be performed by such party before he can call for a deed, his possession is to be considered as by consent only (unless possession be stipulated for) until all the terms of the contract, to be performed on his part, are complied with by him; from which time the possession becomes adverse, and if it so continue for the period of twenty years, the right of the former owner to recover possession is gone. While it is technically true that until the expiration of the period of twenty years the naked legal title remains in such owner, and would support an ejectment; yet, if it appeared that all the terms of the contract had been complied with by the purchaser, no court of law should allow the plaintiff's lessor to issue a writ to oust him of his possession.

Where, as in the present case, the receipt or other evidence of contract, does not describe in any way the land to be conveyed, the acts and conduct of the parties in giving and taking possession, will be treated as part of the transaction, and supply the defect in the instrument. Therefore, if the jury in this case should be satisfied,

from the testimony, that the part of the larger tract owned by Robert Mumford shown on the plot and admitted by the parties to be the disputed land, is the same land of which possession was given to, and taken by, Samuel Mumford, it is to be treated, under such circumstances, as being the lands which the parties had in contemplation and bargained about, the same as if particularly described in the receipt.

Where adverse psssession begins in the life-time of the real owner of the land, it does not cease at his death by operation and effect of law; but, if maintained, continues against his heirs, and all others claiming by or through him, or them, whether or not they be under age, married women or persons of unsound mind at the time of such death. The act of limitations begins to run when the adverse possession commences, and does not stop, but continues, at the will of the party in possession, unless interrupted by adversary act of one having better title.

It appears by the testimony of Robert B. Houston that the security provided for in the receipt given by Robert Mumford to Samuel Mumford, was assigned by the said Robert to him and his brother in part payment for the large tract shown on the plot out of which the piece sold by Robert to Samuel Mumford was carved, and that the same was paid by Samuel. This transaction having taken place so long back, and the immediate parties to the contract of sale having died twenty years ago, the jury in the absence of proof upon the subject, would be warranted in presuming that a deed for the premises bargained for was made in due form. But without being confined to such presumption, the jury have evidence before them that such a deed was in fact duly made. If they believe it, it is sufficient—the non-production of it being accounted for, as is contended by the defendant, by the destruction by fire of the papers of the surveyor to whom it was delivered to enable him to survey the lands of which the aforesaid Robert Mumford died intestate, under an order of the Orphans' Court of Sussex county.

Verdict for the defendant.

MARSHALL J. RUSSELL *v.* THOMAS FAGAN.

Innkeeper—Guest—Responsibility.

An innkeeper is bound for the safe keeping of the beast of his guest.

Guests of an inn are travelers or wayfarers alone, and it is for them alone that the extraordinary responsibility of the innkeeper exists, and not for boarders or persons residing in the same place.

A traveler or wayfarer who seeks and obtains entertainment for his beasts upon consideration of reward or pay charged him by the innkeeper, is a guest, though not receiving personal entertainment; and while such entertainment for his beast continues, he is absolutely liable for any damage or loss to the same, except such as arise from inevitable accident, the public enemy, or the act or conduct of the guest or his friends or servants.

(*New Castle, November 29, 1886.*)

ACTION ON THE CASE to recover for the loss of a mare while in the stable attached to the defendant's inn.

The facts fully appear from the charge of the Court.

Levi C. Bird and *A. E. Sanborn*, for plaintiff, cited:

Shaw v. Berry, 31 Maine, 478; *Coggs v. Bernard*, 1 Smith L. Cas., 375; *Mateer v. Brown*, 1 Cal., 221; Story, Balm., §477; *York v. Grindstone*, 1 Salk., 388; *Yorke v. Greenaugh*, 2 Ld. Raym., 866; *Sibley v. Aldrich*, 33 N. H., 553; *Mason v. Thompson*, 9 Pick., 280; *Peet v. McGraw*, 25 Wend., 653; *Hulett v. Swift*, 42 Barb., 230; *Bennett v. Mellor*, 5 T. R., 273; *Hall v. Pike*, 100 Mass., 495; *McDaniels v. Robinson*, 26 Vt., 316; *Clute v. Wiggins*, 7 Am. Dec., 448; *Norcross v. Norcross*, 53 Maine, 163; *Pinkerton v. Woodward*, 33 Cal., 557; *Berkshire W. Co. v. Proctor*, 7 Cush., 417; *Gile v. Libby*, 36 Barb., 70; *Washburn v. Jones*, 14 Barb., 193; *Jalie v. Cardinal*, 35 Wis., 118; *McDonald v. Edgerton*, 5 Barb., 560; *Grinnell v. Cook*, 3 Hill, 485; *Richmond v. Smith*, 8 Barn. & C., 9.

Charles B. Lore and *Harry Emmons*, for defendant, cited:

Story, Bailm., 9th Ed., §§ 470, 472, 482; *Merritt v. Claghorn*, 23 Vt., 177; 2 Kent Com., 592, 593; *Calye's Case*, 8 Coke, Rep., 32a; *Dawson v. Chamney*, 48 E. C. L., 164; *Burgess v. Clements*, 4 Maule & S., 306; *Cutter v. Bonney*, 14 Am. Law Reg.,

445; *Howth v. Franklin*, 20 Tex., 798; Redf. Com. Cas., 595-597; *McDaniels v. Robinson*, 26 Vt., 316; *Johnson v. Richardson*, 17 Ill., 302; *Richmond v. Smith*, 8 Barn. & C., 9; *Metcalf v. Hess*, 14 Ill., 129; *Johnson v. Richardson*, 17 Ill., 302; 1 Pars. Cont., 4th Ed., 629; *Berkshire W. Co. v. Proctor*, 7 Cush., 417; *York v. Grindstone*, 1 Salk., 388; *Binns v. Pigot*, 9 Carr. & P., 208; *Grinnell v. Cook*, 3 Hill, 485; *Ingallsbee v. Wood*, 33 N. Y., 577; *Healey v. Gray*, 68 Maine, 489.

COMEGYS, C. J., charging the jury:

This action is brought by the plaintiff to recover from the defendant damages to the extent of $500 for the breaking of one of the hind legs of the plaintiff's mare, while she was in the defendant's stable in Wilmington.

The plaintiff is a citizen of the State of Pennsylvania, resident at Landenberg, in Chester County, and the defendant, at the time of the disaster, was and yet is a common innkeeper or hotel keeper at the sign of the White Horse in this city. On the day before the time of the accident the plaintiff, having occasion to Wilmington, came here in the afternoon and went to the defendant's inn, where he put up his mare and carriage, and at the same time delivered a quantity of oats to be fed to the horse during his stay in the city, and also a bottle of liniment, which he directed should be rubbed from time to time on her hind leg, in which she was lame—as he said—from the travel of eighteen miles. He then went away and did not return again till the next afternoon. He had no personal entertainment at the inn, nor did he ask for any—having it provided for him elsewhere.

The next morning it was discovered that the mare's leg aforesaid was broken, according to the defendant's two witnesses, by her attempting to rise in the stable, after she had shortly before lain down. Their statement is that in the morning, about 10 o'clock, they being in the stable, the mare (which the groom stated was very lame when she arrived) fell in her effort to rise; and that, one of them saying that she had broken her leg, they examined her and found that his assertion was verified. The groom swore that she had lain down for about fifteen minutes, when she attempted to rise with the consequence alleged.

The plaintiff, as a witness, in reply to a question put by his counsel, stated that when the mare was put in the stall he discovered that there was a hole in one of the side walls, a board there having been broken; but it was not stated by him that he called anyone's attention to that fact. This statement was denied by the defendant, by his groom, and by the other witness, all of whom testified that there was no hole as stated by the plaintiff; and the latter swore that a short time before he had put all the stalls in good repair, as the defendant had also sworn.

The mare was killed to relieve her suffering. This was before the plaintiff came back to the premises. As he had furnished the oats for the feed of his mare, he paid nothing to the defendant for her grain diet; but he did pay twenty-five cents for the hay given her in the stable, which was attached to and part of the inn property. Payment for the loss of the mare was demanded by the plaintiff from the defendant, but refused by the latter. Two witnesses for the plaintiff found the mare to have been worth $200; the plaintiff put her value, in his testimony upon that point, at $50 more.

These I believe to be the material facts in this case; and upon them the plaintiff asks a verdict at your hands for the proved value of the mare, with interest from the time of the casualty, the 7th day of September, 1884; and the defendant resists such demand, insisting that no liability on his part can arise out of them—his principal ground being that the plaintiff was not a guest of his inn, and his other that the accident was the result of some natural or other defect of the bone of the mare's leg, of which he could not have any knowledge, nor against accident from which he could protect himself; and that therefore the occurrence was one against which human foresight could make no provision, and comes within the exception to extreme liability in the case of carriers known to the law as inevitable accident. This we understand to be his second point.

We will briefly discuss these legal contentions of the parties and instruct you what the law is by which in this case you are to be governed:

The first question to be decided is: Was the plaintiff a guest of the defendant at the time of the accident to the mare? If he

was, then what liability to him on account of receiving the mare by defendant and placing her in his stable to be served with hay, fell upon or was incurred by such defendant? If he became liable for her return to him in as good condition as she was when the defendant received her, is there anything which will excuse such liability, and if so, did such excuse exist in this case, upon the testimony of the defendant and his witnesses? These are, under the circumstances, very interesting questions, none of which have before, in this State, been presented for consideration to a court and jury. They concern the whole traveling public, and that body of men very numerous in this country, called innkeepers, or keepers of what are now called hotels.

It is said that inns exist for the benefit of the traveling community. In fact they are almost as much a necessity to travelers as the public means of locomotion are. There was a time when anyone could keep an inn; but that is now long past, and none are allowed to maintain them but persons regularly licensed by public authority. In them wayfaring people of every kind, if they can afford the expense which the host charges for that service, can be accommodated with diet and lodging; in other words, can be entertained in their journeyings. The necessities of such people oblige them to solicit entertainment at the public or common inns, both for themselves and their beasts where they travel with such; otherwise they would be without shelter and food. Because of this necessity and that the host or entertainer is generally unknown to a party resorting to his house, or inn, and that such party is compelled to trust himself and his property to his keeping, and that he is charged by the innkeeper for such entertainment of himself and his beasts, and the custody of his property, the law holds the innkeeper to a strict liability; not from any contract between the parties, but from the duty growing out of his public employment. One of the incidents of his business of common innkeeper is that he is bound to receive and entertain all such as apply to him for that purpose, and are in fit condition to be taken into a public inn as guests, provided there be room for that purpose. There are statutory exceptions to this rule, but I am not now concerned to speak of them. Another of them is that he is bound for the safe keeping and well keeping of the beasts of the guest, and his goods,

that is, his luggage, apparel, money, etc., so that if any of them be stolen, or otherwise lost or damaged in his inn, while the relation of host and guest continues, he must make good such loss or damage.

Everyone who is received into an inn and has entertainment there, for which the innkeeper has compensation by way of remuneration or reward for his service, is a guest. The relation of host and guest exists. This general definition, however, only includes those who in a legal sense are travelers or wayfarers; and boarders, or persons who reside in the same place, are not embraced by it. It is only travelers or wayfarers that the innkeeper is bound to accept as guests, and it is for them alone that he is under extraordinary responsibility for the safe keeping of beasts and goods. Inns are for them, as the books teach us; that is, for their sustentation and nourishment and protection of their goods from depredation by thieves and robbers at stages of repose in their journeyings.

The liability of innkeepers to others than those just mentioned is not so great; but it is very adequate. Taking the definition before given in its strict sense, it would seem that the term "guest" only applies to those who lodge or obtain meat or drink, at an inn, for compensation to the innkeeper. But this, is not the case, as we think. Upon this subject the authorities are, unfortunately, not agreed; but after a careful consideration of them, especially upon review of the older ones, those nearest to the time when inns began to be recognized and controlled by law, we are satisfied that the law may be given to you by us, and we now declare it for your guidance; that if a person who comes within the meaning of the term "traveler or wayfarer," that is, being upon a journey passing over the country from place to place, or from one place to another and returning, has occasion to seek entertainment for his beasts, and obtains it for them, upon a consideration of reward or pay charged him by the host or landlord, he is in the legal sense a guest, as much so as if he had himself received personal entertainment; and while such entertainment for his beast continues, if any damage or injury happen to them or they be stolen, he is, subject to certain exceptions to be mentioned, absolutely liable for them, to the same extent as if he had undertaken against the particular damage by a special agreement.

The law makes the owner a guest because of the compensation charged by the innkeeper. The liability of the traveler for that (which attaches upon the reception of the beasts) constitutes this relation of host and guest. It is his property that is nourished, while upon his journey, and that in law is the same as if he had been in his own person the actual recipient of entertainment. It would be otherwise entirely of dead or inanimate things, left at the inn by such traveler, as to which nothing would be paid to the innkeeper. The existence of an inn involves in legal contemplation a stable attached to it also; and travelers with horses and carriages are not to be presumed to put them up at the inn to be kept there otherwise than as in inn-stables strictly; whereas, those not travelers in the sense I have been employing, but merely putting up their teams at the inn stable as a livery (as is the case with persons residing near towns who use such stables as mere conveniences) are not to be considered in the light of guests, and entitled to the same degree of protection as travelers are. They do not strictly come within the definition of travelers—persons upon a journey. Livery stable keepers are under different and less weighty responsibility than innkeepers; and they are justly without one great benefit the latter possess.

I have said that where the relation of guest in an inn exists, whether from personal entertainment or for that given to the traveler's beasts, the innkeeper is absolutely liable for all loss or damage to the property of the guest, subject to certain exceptions. They are what is called the act of God, such as earthquake, lightning, flood; the public enemy, that is, the forces of a nation engaged in hostile war with that of the innkeeper; and the act or conduct of the guest or his friends or servants. The first of these is aptly called inevitable accident without the intervention of man (2 Kent Com., 597); that is, some casualty which human foresight could not discern, and from the consequences of which, therefore, no protection could be provided.

If the statements of the witnesses for the defendant are to be believed, the fracture of the mare's leg was not occasioned by any defect in the stable in which she stood—for they, and the innkeeper also, testified to its good condition—but was the result of accident entirely, falling upon the leg in the endeavor by the mare to get up.

If it was broken in that manner, then it could not have been prevented by any care or previous provision by the innkeeper. You must disbelieve this testimony entirely if you give credit to that of the plaintiff, who swears to a hole made by a broken board in one side of the stall—in which state it might be supposed that the mare got her leg in that hole, and thus it was broken. You have three witnesses to one that there was no hole at all; but still you may consider the evidence of that one of greater weight than that of the three others. The plaintiff, however, and the defendant are both interested witnesses, and stand alike with the bias of interest upon their minds.

Until of late parties to a suit could not be witnesses, from risk of perjury. The risk still exists, although the law has been changed; but the jury are to judge of their credit, according or not as their statements are corroborated, or, from all the circumstances, they appear to be correct.

The mare was certainly lame in that leg when she came to the stable, by all accounts, though the statements as to the degree of lameness differ. She had come but eighteen miles, however. There is, I believe, no evidence before you that a horse with good limbs would be likely to fall lame, more or less, in a drive of eighteen miles; and there was no agreement of counsel in that respect. This is matter of experience and observation; among the qualities of a beast worth $200 it would seem there should be one that it can stand, without lameness, a drive of eighteen miles. The theory of the defendant is that the lameness arose from previous injury to the leg; and scars upon it at the place of the fracture were sworn to in behalf of the defendant, as existing at the time the mare came to be bathed and rubbed with the liniment the plaintiff had brought with him to the inn. That of the plaintiff is that it arose wholly from the drive that afternoon. The shoe from the foot on that leg was removed by the groom, upon the request of the plaintiff; but if the testimony of the groom is to be believed, that gave no relief, for the mare appeared down to the time of the accident to be in great misery. The plaintiff also swore, as suggesting a cause of the broken leg, that there was a horse in an adjoining stall; but the defendant and his groom swore to the contrary.

Having instructed you that, in contemplation of law, the

plaintiff was a guest of the inn at the time of the causality to his mare, which was entertained there, the question for you to decide is this: Was the breaking of the mare's leg a pure accident; that is, a causalty in no degree chargeable to any act or omission of the defendant or his groom? An innkeeper is, like a common carrier, an insurer of the goods of his guest. When such liability is the subject of an action, he is deemed in law to be *prima facie* responsible, so that if a plaintiff proves himself a guest, in a legal sense, and sustains a loss while that relation exists, the inkeeper's obligation to pay for it at once becomes perfect, unless he can show that the loss occurred by the act of God, the enemies of the country, or the fault or misconduct of the plaintiff or his servants or friends of his company as before stated. Nothing short of inevitable accident, casualty of war, or act of the plaintiff, his servants or such friends, will excuse him.

This is, apparently, hard law; but were it otherwise, the property of guests at an inn would be in such insecurity from the practices of dishonest landlords, with corrupt servants, that the necessity of travel would be encountered with dread and apprehension. Public policy demands that the necessities of intercourse by travel shall not involve danger of loss from innkeepers, any more than from common carriers, who are liable to those employing them exactly as innkeepers are to their guests; and they alike have a right to protect themselves by special contract not contravening such policy, and have also the important privilege of retaining the property for which their liability exists until their charges in the one case for the entertainment given, and in the other for the carriage of the goods, are paid. Neither a livery stable keeper nor a private carrier has by the common law any such privilege. He may excuse himself by showing due diligence.

Should you discredit the testimony of the defendant and his witnesses and refuse to ascribe the calamity that happened to the mare to unavoidable accident, which no care or attention could guard against under the circumstances, then your verdict should be for the plaintiff, for the value of the mare in her condition of lameness at the time she was delivered to the innkeeper; but if you do not discredit the defendant's witnesses and believe that the mare broke her leg as stated by falling down upon it in attempting to

rise in the stable, then it should be for the defendant. Should you find for the plaintiff, your verdict may include a sum of money beyond the value of the mare, as and for further damages, which sum would be, as fixed in like actions, the amount of interest the principal sum (or value of the mare) would draw from the time of her loss till the present time.

With respect to the legal conclusions we have arrived at in our examination of the authorities cited and others also, we have to say, in our opinion those presented by the counsel for the plaintiff fully justify the claim of his client, and are greatly in preponderance over those offered by the other side, which would be ample for the defendant's contention, if they were not opposed by such an array of potent decisions in hostility to them. And we may say, we trust with a due sense of the gravity of the observation, that we think the report of *Calye' Case*, 8 Coke, Rep., 32a., did not justify the opinion of it expressed by some eminent judges, particularly Justice Story, in treating of the law concerning innkeepers. Lord Coke certainly we think did not mean that an innkeeper was not an insurer, or he would not have used the language immediately following, that relied upon by Justice Story, in support of his theory of qualified liability beyond that of a carrier. His meaning seems to be that ascribed to his language by a learned California judge in *Mateer v. Brown*, 1 Cal., 221.

Verdict for the defendant.

DANIEL H. KENT *v.* MAYOR AND COUNCIL OF THE CITY OF WILMINGTON.

Municipal Corporation—Care of Streets—Diligence.

It is the duty of an incorporated city to keep its streets in a good and safe passable condition; and in regard to the work in relation to said streets the same degree of diligence is required as a good business man would show under like circumstances.

(*New Castle, December 3, 1886.*)

ACTION ON THE CASE for damages sustained on Fourth street

in the City of Wilmington by reason of it being left in such bad condition after putting in a pipe and filling up the excavation, that a pair of the plaintiff's horses and his double carriage were seriously damaged by it.

Daniel H. Kent testified that on the thirteenth day of August, 1885, a little after dark in a rain, I was coming into the city with Mr. Voshell and my driver and while driving at a jog trot between the rails of the railroad on that part of the street, one of my horses suddenly began to sink into the road, and then the other, until both sunk together between the rails and the front wheels and axle of the carriage with them up to the hubs of the wheels. The horses after struggling to extricate themselves from the position, by holding them in by the rains, became quiet, and after no little labor and effort were extricated from it. Both of them and one in particular, were seriously and permanently injured by the accident. When it occurred they were worth a thousand dollars and I would not have sold them for that unless in particular need of money; they were not worth after it more than two hundred. There had been a heavy rain that afternoon.

Wm. H. Voshell and his driver confirmed the testimony of the preceding witness.

The evidence on behalf of the defendant was to the effect that the Water Department were laying a water drain across the street at that place and dug a trench for that purpose about nine feet long and about two feet and a half wide and four and a half to five feet deep. It was filled in with earth and covered over with macadam; the whole job was done and finished in a workmanlike manner.

Harry Emmons, for the plaintiff: The city is liable for the damage by reason of the negligence of its servants. The city ordinance requires contractors or builders who have permission, among other things, to make excavations in the streets, to place danger signals consisting of red lanterns at either end of the excavation during the night time, which clearly indicates a recognition on the part of the City Council of the prudence and propriety and the necessity of such danger signals in such a case for the protection of the public.

Henry C. Turner, for the defendant: If the accident was the result of the extraordinary rain that fell that afternoon and evening, the city was not liable for the injury.

COMEGYS, C. J., charged the jury: The duty of the city is to keep the streets of it in a good and safe passable condition. The degree of diligence required of the city in the case of such work as was done in filling up the trench cut on Fourth street in August, 1885, for the purpose of laying a water pipe, is such and no more, as that which a good business man would have shown under like circumstances, *Whar. on Neg.*, Sec., 48. The want of such diligence is ordinary negligence, Ibid., 49.

Verdict for plaintiff.

MARY E. HOGG *v.* ELIZABETH W. LOBB'S EXECUTOR.

Married Woman's Act — Construction of Statutes — Action by Married Woman — Statute of Limitations.

In the construction of statutes, unless words used in them have some technical meaning they shall be taken to have been used in their ordinary sense or meaning.

The word *family* in the "Act for the protection of women" has no technical meaning, and is there used in its ordinary sense or meaning.

Supplying a nurse to a sick boarder is no part of the ordinary contract of boarding. And the plaintiff, being a married woman, having nursed a sick boarder in the family of her husband, with an understanding that she should be paid for said nursing, may recover in her own name the value of said services out of the estate of said sick person, afterwards deceased.

Recognition of indebtedness by the deceased person within three years prior to bringing suit will take the claim out of the statute of limitations.

(*New Castle, December 7, 1886.*)

ACTION OF ASSUMPSIT for nursing the testatrix, sum demanded sixteen hundred and twelve dollars with interest from Sept. 3, 1885.

The testatrix boarded with plaintiff for many years and since eighteen hundred and eighty she had been afflicted with chronic erysipelas which caused an ulceration of one of her limbs between

the knee and ankle and also with chronic diarrhea and she had often told the plaintiff that she should be paid for her trouble.

Chas. B. Lore, for the defendant:

Under our married woman's statute can the plaintiff who is married and was at the time and is still living with her husband as a member of his family, maintain an action in her sole name for the services rendered by her in nursing the testatrix while a boarder and lodger in the family of her husband, and as she was a boarder and lodger in the family of the husband, and as such was nursed by her in the family, were not the services rendered by her for the family in contemplation of the statute as much so as any other services rendered her or any other boarder at the time in the family? Has anything been proved in this case to take it out of the operation of the act of limitation which after the lapse of three years barred the action on any promise of the testatrix if any was ever made by her, to pay the plaintiff for nursing her?

Harry Emmons, on same side.

Levi C. Bird, for the plaintiff: This was a personal service and not for labor performed for the family. And if it was any defence to the action it should have been specially pleaded and cannot be taken advantage of now under any one of the pleas in this case which was simply the usual pleas filed in an action of assumpsit. On the other point I contend that in accordance with the decisions upon that question, it is a question of fact to be determined by the jury.

Comegys, C. J., charged the jury: This is the first case in which an action has been brought in this Court by a married woman, living with her husband, in her own and sole name since the passage of the statute of 1873 in regard to married women.

The rule for the construction of statutes is—that unless words used in them have some special meaning in law, that is, technical meaning, they shall be taken to have been used in their ordinary sense or meaning, that sense in which they are usually understood in common

speech. Regarding the word *family* then in the "Act for the protection of women" (Rev. Code, page 479, sec. 3) in this latter sense, for it has no technical meaning, we say to you that it means the household, or collection of persons, including husband, wife, children, lodgers, servants, residing together and receiving diet, lodging, etc., from a common supply, or source—and subject to rules for their government, as members of such household, with respect to such membership. Keeping this definition in mind, then what duties, other than those of a moral nature, devolved upon the plaintiff in this action with reference to the family of her husband? She was his wife—her husband was the legal head of the family. It was her duty, as wife, to do and superintend the doing of all such acts and things as were necessary for the due and proper management of the domestic concerns of the household, so far as her ability enabled her, and the means supplied her by her husband were adequate for the purpose. This included among other things the keeping of the house in good and clean condition, the proper cooking and furnishing at reasonable hours of food for her husband and the children of the household, due attention to their wardrobe, and nursing and attention to them in sickness. It included also attention of the same kind to her boarder, with the exception of attention to her wardrobe and nursing her in her illness. No duty was upon her as the wife of her husband to do that. To attend to her ordinary wants as a healthy person (if she had been one) would have been part of her duty as wife; but to nurse her in her illness was no part of it. The duty of a wife is to her husband and children; it is not to a boarder, beyond supplying him or her with food and lodging in good condition according to the price paid for such entertainment. She is no more bound to become the boarder's nurse than she would be to become his or her physician if she have the requisite skill. Nursing is a distinct occupation; and supplying a nurse to a sick boarder, is no part of the ordinary contract of boarding. If therefore the jury should be of opinion that the plaintiff was the nurse of the deceased, and that such deceased recognized her as such, and that her services in that respect were not gratuitous, but were to be paid for by her, or out of her estate, then the plaintiff is entitled to recover such value as she has proved such services to have been worth. And in answer to the objection that if she can re-

cover anything, she cannot go back for more than three years from the time of bringing the suit, we say to you that if you find, from the testimony, that recognition by the deceased of her indebtedness to the plaintiff, was made from time to time during the period for which the claim is made (five years), one of which was before three years from the 3d of September, 1880, had expired, and another within three years of the first time and a like time before the bringing of the suit (15th September, 1885), then there is no bar to the recovery for five years of services as nurse.

Verdict for plaintiff.

MARY J. VALENTINE *v.* JOSEPH R. TANTUM.

Married Woman—Action for Services.

A married woman cannot recover for services rendered to her husband's employer, said husband having previously contracted for the services of his family and himself and said married woman's services having been rendered while living with her husband.

(*New Castle, December 22, 1886.*)

ACTION OF ASSUMPSIT.

Narr with common indebitatus count and a count on a special and express promise to the following effect: That the defendant agreed at the request of the plaintiff to purchase the stock and farming utensils and other goods sold at a constable's sale of her husband's property and to sell the property purchased to her at the price paid at said sale, the plaintiff and her husband to become the tenants of the defendant, who was to lease the farm then occupied by them, and she agreeing on her part to pay for said goods and chattels so sold to her by her own work and labor on said farm, and by any other means in her power.

Mary J. Valentine, testified that she lived on Mr. du Pont's farm in Brandywine hundred in November, 1875, when the property of my husband was sold at constable's sale on execution

process, consisting of farming stock, corn, hay, wheat in the ground, oats, turnips, chickens, wagons, carts, mowing machine, cultivator, hay rake, ploughs, harness, household furniture, etc. There were as many as two hundred and fifty people at the sale I should think. The defendant also was there and bought all of the things for the sum of four hundred and fifty dollars. We continued on the farm four years after that and furnished twice a week during that time to the defendant at his house in Wilmington, farm products such as butter, eggs, poultry, sausages, etc., amounting in value to as high as three dollars per week. During that four years I never received a cent from the defendant for any thing I furnished him, or for any service I rendered him, the latter I think was worth seven dollars per week. Before the sale I went to Dr. Tantum and told him we were going to be sold out, and I wanted him to buy the property in for me and I would pay him for it. I cannot repeat his answer, but it was satisfactory and often after the sale in talking with him about my affairs he would speak of the property as mine and encourage me with the manner in which I was getting along and my prospects of success.

On cross-examination: It was a few days before the sale I went to see Dr. Tantum. I did not say to him at the first interview, when I applied to him to buy in the property for me at the sale, that there was a thousand dollars coming to me from down the country, and when I received it I would pay him for the property. I kept no account, after the first few months, of the articles I delivered to him from time to time in payment for it, or of the services rendered him. He said to me at one time, "You have a nice little stock around you." I do not know that after the sale Dr. Tantum and my husband entered into an agreement about the place and property. I knew Dr. Tantum had rented the farm of Mr. du Pont, but I did not know that he had an agreement with my husband to carry it on for him. I once heard the Dr. say that my husband was running behind on the farm, and he would have to sell out, but he came out in a day or two afterwards and contradicted it.

Thomas Hinkinson testified: I attended the sale and saw Dr. Tantum there, and after the conditions of the sale were made, I

saw him step out and heard him say to the company there met, some two hundred and fifty persons, "Gentlemen, I wish it to be understood, that any thing I may buy at this sale, I shall buy for Mrs. Valentine." It had the effect to cause the goods to sell for considerable less than they otherwise would, I think.

William W. Pritchett testified: I was the constable who made the sale, the aggregate amount of it was four hundred and fifty dollars. The things sold below their value and sold very low. They were worth six or seven hundred dollars. Dr. Tantum bought almost all that was sold. Two hundred dollars worth of the goods were exempt and set off to Mr. Valentine, the defendant in the execution.

Wesley Husbands testified: Was at the sale and heard Dr. Tantum say three or four times during the sale that he was buying the goods for Mrs. Valentine. Very few other persons bid at the sale, and it was generally supposed that he was going to give them to Mrs. Valentine. I think the goods he bought were worth eight hundred dollars.

George Dining testified: I bought the property on the place where Mr. and Mrs. Valentine left it, and gave one thousand and seventy two dollars and fifty-two cents, and paid it to Dr. Tantum. I succeeded Mr. Valentine in the possession of the farm, and by contract, made December 16, 1879, with Dr. Tantum I bought the articles mentioned at the aggregate price before stated.

William W. Pritchett was recalled and produced and proved the appraisement made by him when he levied the execution on them.

Mrs. Valentine was recalled and testified that she had no contract with Dr. Tantum for carrying on the farm.

Charles B. Lore, for the defendant, moved a non-suit on the grounds that there was no evidence of money had and received by the defendant to and for the use of the plaintiff. Nor is there any evidence that the plaintiff had any contract with the defendant for

carrying on, or doing any work on the farm. Nor was any work which she performed on the farm done for the defendant, but for her husband, or his and her family, and she could not recover for such services under the third section of the statute in regard to the rights of married women.

THE COURT refused the motion.

Dr. France testified.

Counsel for defendant produced and prosposed to prove by this witness a written agreement between Joseph R. Tantum and Isaac E. Valentine made July 5, 1876, and offers it in evidence.

Levi C. Bird, for the plaintiff, objected to its admission and contended that nothing done or said or agreed to by her husband, after the sale of the goods, in regard to the possession of the farm and the carrying on of it, without the knowledge and consent of the plaintiff, could be admissible in evidence against her in this action.

Lore, replies.

The Court admitted the agreement in evidence for the possession of the premises for the year 1876, and also for each of the years of 1877, 1878 and 1879.

Joseph R. Tantum testified: First Mr. Valentine came to me and told me he was about to be sold out, and wanted me to help him, and soon after Mrs. Valentine came to see me and was in great trouble and distress and wanted me to attend the sale and buy the goods for her, telling me that she had a thousand dollars coming to her from a relation in Kent County, in the hands of Mr. Smither's and when she got it I should be paid for them. I consented and attended the sale and bought the goods in my own name but publicly stated before doing so that I was buying them for Mrs. Valentine. I gave more money for them than I received for the same goods when I sold them afterwards. I kept a true account of the butter and eggs, etc., delivered to my family from the farm from time to time and which were delivered by Mr. Valentine. Had a settlement with Mr. Valentine on the twenty-fifth day of September, 1877, and have his receipt of that date for

eleven dollars, the balance due and paid to him on that settlement.

Receipt produced, proved and put in evidence and proved by items that about seven hundred dollars worth of goods were added to the stock of goods bought at the constable's sale before he afterward sold the goods to Mr. Dining.

When I found I had lost a thousand dollars and was losing money continually under the agreement, and told Mr. Valentine I would have to terminate it and he would have to leave the farm, he flew into a passion and swore that he would not leave it, and said that I could not put him off, nor should I come on the farm.

Percy L. Tantum testified: Was present in my father's office the first time Mrs. Valentine came to him about buying their goods. She was crying, and when I went in I heard her say if he would buy them she would pay him as soon as she got some money that was coming to her from down the State. My father asked her when she would get it, and she said in a few weeks.

Adam C. Benson testified: Lived with the defendant as a servant during the four years, and was sent out by him in the fall of 1879 to Mr. Valentine's to get a mare that was on the farm. He would not let me have it and said "he be damned if he (Dr. Tantum) should have it," and that he wanted to get his (Valentine) mare away from him.

Dr. Tantum was recalled and testified that during the time the Valentines lived on the farm he made no objections to them using all the products of the farm they needed for their subsistence.

Levi C. Bird, for the plaintiff, asked the Court to charge the jury: That although the plaintiff was living with her husband engaged with him in carrying on the farm for the defendant; yet if there was a contract express or implied existing between the plaintiff and defendant, growing out of sale of the stock, and the purchase of the stock by the defendant for the plaintiff such contract will entitle her to recover at law for work and labor, in her own name under the act for the protection of woman in this State.

Charles B. Lore, for the defendant, asks the Court to charge the jury on the following points:

1. The property claimed as exempt cannot be taken into consideration in this cause. It was set off as the property of I. E. Valentine, the husband of the plaintiff, and whatever disposition may have been made of it, the defendant would be responsible to I. E. Valentine and not to the plaintiff.

2. The plaintiff cannot recover for work and labor and at the same time claim to recover for the products of that work and labor.

3. While the law will imply a contract where valuable services are rendered by one which are accepted by another under the particular circumstances, yet where a husband and wife are living together, and the husband as the head of the family is contracting for the labor of said family, the law will not imply a separate and distinct contract for the services of the wife in the absence of any distinct and express contract in relation thereto.

COMEGYS, C. J., charging the jury:

GENTLEMEN OF THE JURY:—This is one of the few cases which have arisen under the legislation which, for brevity, we call "the married woman's act." None of them have yet been reported, on account of their recent occurrenc. This action is by a married woman, and her husband is no party to it. This, no doubt, appears strange to some if not the most of you: it is, therefore, proper that I should charge you with respect to that legislation, in order that you may understand how the action before us, or rather how it is that a suit can be brought in this Court by a married woman at all. This renders necessary a brief exposition of the law of husband and wife, before the married woman enactments were passed.

By the law which, down to the year 1865, always prevailed in this State, and which as part of the ancient common law our English forefathers brought with them to America, as a juridical system for the government of their private affairs, husband and wife were as one person—the act of marriage for most civil purposes merging her existence in his. As a consequence of this, all such property as was of a movable nature, what we usually call goods

and chattels, including money, immediately became his, without any act on his part to obtain actual possession of it. So that, if he died instantly upon the completion of the marriage ceremony, it would have passed to his personal representatives, that is his executor or administrator, to be administered as part of his estate or assets. Another consequence was, that every right in action of hers for the recovery of money payable to her, became his also; but in the case of such, in a qualified sense. That is to say, he had the right to sue for and collect the money secured by it, or payable without any writing, and apply it to his own use. The action at law for this had to be in the name of his wife as well as himself, because it was in her right. In such case, if the money recovered was not, either paid voluntarily to the husband in his lifetime, or such result had not been reached by process issued by him, or his attaching creditors, as to operate what is called a reduction into possession of the fund, she surviving became solely entitled to it. If he survived her, however, he having the right to administer on her estate, became entitled to it as her administrator; and as the sole distributee of her estate, the absolute ownership devolved upon him, subject to the payment of her debts—which the marriage shifted from her to him, but conditionally; that is, that judgment was recovered against him for them in her lifetime.

As by the common law, the separate legal existence of the wife was merged civilly in that of her husband, it necessarily resulted that she could not make any contracts: for if her property became that of her husband upon the marriage, and any she acquired became his also, which it did legally also, there being nothing to contract about on her part, there was no necessity for the existence of the power; and, as in nature where there is no use for a faculty, it does not exist, so in the case of a married woman, there being no use for a power to contract, no power existed. I am speaking of an independent power on her part. If her husband gave her authority, either expressly, or by inference, she could, as his agent, make a contract that would bind him—but none that would hold her.

This condition of things was considered not to be in general harmony with the common law, which is in the main a humane as well as a wise code, and it stood much in the way of just provis-

ions for the independent sustenance of the wife, which her friends might wish to make. Accordingly there grew up, with the expansion of the equity administration of the chancery, a rule of that Court, that where property of any kind was limited, by any species of legal conveyance, in such terms as clearly showed that it was to be her's alone, and not in any respect his, it should be so treated and considered; and that with respect to it, she should be treated as any single woman, and might sue in that Court for it upon contracts made by her in relation to it, or otherwise—all without the use of the name or the agency of her husband. If the property had been limited to a person as trustee, the proceedings would be in her name, or in the name of a next friend where there was no trustee. The trustee might also sue as such in a Court of law, because the legal title would be in him.

The law thus continued in this State until the year 1865, when the legislature initiated the legislation I have before referred to. This was by the act entitled "An Act for the benefit of married women," to be found on page 478 of the Revised Code. It is in these words:

"SECTION 1. That the real estate, mortgages, stocks and silver plate belonging to any married woman at the time of her marriage, or to which she may become entitled at any time, during her coverture, shall remain and continue to be her sole and separate property, and shall not be subject to the disposition of her husband by alienation, transfer, assignment or otherwise; or be liable to the debts or contracts of her husband, except where such debts are judgments recovered against him for her liabilities before marriage: *Provided*, That nothing in this section shall be construed to authorize the wife to sell or otherwise dispose of her real estate, mortgages, stocks or silver plate without her husband's consent, evidenced by writing under his hand and seal, or to authorize her to create any incumbrance upon her real estate, or to dispose of the rents, issues and profits thereof, or the interest upon her mortgages or dividends or other income arising from her stocks, without his consent evidenced in the same manner; And *Provided further*, That nothing herein contained shall be construed to affect, in any manner, the rights of the husband (if he survive the wife), as tenant by the courtesy in the real estate of his wife.

"SEC. 2. That if the money secured to be paid by any mortgage or mortgages belonging to any married woman shall be paid during her coverture, or if with the consent of her husband as aforesaid she shall dispose of her real estate or stock, she may, with the consent of her husband, as aforesaid, invest in her own name the money so paid upon her mortgages, or arising from the sale of her real estate or stock, in other real estate or in stocks, or loan the same on mortgage or mortgages, and such investment or loan shall be her sole and separate property and subject to all the provisions of Section 1 of this act.

"SEC. 3. That all laws and parts of laws of this State inconsistent with the provisions of this act be and the same are hereby repealed, made null and void.

"*Passed at Dover, March 17, 1865.*"

The object of this act was, to put the real estate, mortgages, stocks and silver plate of the wife out of the power or control of the husband, or the reach of his creditors; in other words, it was to make those species of property hers separately, the same as they would be in equity if they had been limited by deed or will for her exclusive use. But all the incidents of separate property in equity were not allowed to attend the operation of the statute; as is shown by the two provisos to the first section. The second section is also restrictive of the meaning and effect of *separate* property, as I have already explained such meaning. The chief purpose of this act seems to have been what I have intimated—to secure a married woman's real estate and her mortgages, stocks and plate against her husband's interference, or that of his creditors; the rents of the former, to which but for the act he would be entitled, being protected from him and attachment by his creditors, as the other subjects of property were.

In 1871 the next act was passed. It provided as follows:

"AN ACT TO SECURE TO MARRIED WOMEN CERTAIN OF THEIR OWN EARNINGS."

"SECTION 1. That money or other property held or acquired by a married woman, living separate from and not supported by her husband, and which has been kept separate from and can be distinguished from the money or property of the husband, shall not

be deemed his property or taken for his debts so long as they shall live separate and he fail to support her in whole or in part; but such property may be taken for debts and liabilities contracted or incurred by such married woman whilst so living apart from her husband, and for the recovery thereof she may, whilst her separation continues, be sued as a single woman, and may sue in her own name and for her own use for debts contracted and liabilities incurred to her. For her indebtedness and liabilities, contracted or incurred whilst living separate from him without his default, he shall not be liable, otherwise he shall be responsible for them to the same extent that he is now responsible by law. In case they again cohabit, he shall be responsible for all her debts and liabilities contracted or incurred during such separation.

"*Passed at Dover, March 23, 1871.*"

By this act, the money or other property of a married woman living in a state of separation from her husband, and which had not been mixed with his, should not be his or liable for his debts so long as they remained separate and she was not supported by him; but it might be subjected to her debts while so separated from him by suit against her alone; and she might sue alone with respect to it. This is entirely consistent with the idea of exclusive ownership. The husband was not liable for these debts, unless it was his fault that they separated, then he was liable for the whole of them. This act is the first provision for the right of a married woman to bring a suit at law in her own name: but such right is confined, in terms, to debts contracted and liabilities incurred to her, whilst her separation continues. The right given is reasonable, in view of the features of the act—the faculty or power attends the provision for the separate property.

The last act affecting the subject in hand and necessary to be commented upon, for this case, is the one next passed, viz. that of 1873. It is in these words:

"AN ACT FOR THE PROTECTION OF WOMEN."

"SECTION 1. That the real and personal property of any female who may hereafter marry and which she shall own at the time of her marriage, or that any female now married may receive by gift, grant, devise or bequest from any person other than her husband,

shall be her sole and separate property, and the rents, issues and profits thereof shall not be subject to the disposal of her husband nor liable for his debts.

"SEC. 2. That all debts contracted before marriage by the wife, or by her authority after marriage, shall be a charge on her real and personal property, and a judgment therefor may be recovered against her in her name.

"SEC. 3. That any married woman may receive the wages of her personal labor not performed for family, maintain an action therefor in her own name, and hold them in her own right against her husband or any other person; she may deposit the same, or any other money belonging to her, in her own name in any bank, savings bank, or other institution for the safe keeping of money, subject to her sole right and authority to withdraw the same in whole or in part at any time without the consent or control of her husband, and upon the payment to her by any bank, savings bank or other institution for the safe keeping of money, or any moneys so deposited, they shall be exonerated from any further liability therefor.

"SEC. 4. That any married woman may prosecute and defend suits at law or in equity for the preservation and protection of her property as if unmarried, or may do it jointly with her husband, but he alone cannot maintain an action representing his wife's property; and it shall be lawful for any married woman to make any and all manner of contracts necessary to be made with respect to her own property, and suits may be maintained on such contracts as though the party making them was a *femme sole*.

"SEC. 5. That any married woman of the age of twenty-one years and upwards may, with the written consent of her husband, given under his hand and seal in the presence of two witnesses, dispose of her property, both real and personal, by will; but such disposal shall not affect the rights of the husband as tenant by the courtesy; and if she die intestate, her property, both real and personal, shall descend to her heirs as now provided by law, and administration and distribution shall take place accordingly, but a husband and wife, by a marriage contract executed in the presence of two witnesses before marriage, may determine what rights each shall have in the other's estates during marriage and after its disso-

lution by death, and may bar each other of all rights in their respective estates not so secured to them, and if any married woman shall die intestate without having had any lawful issue, then and in that case her husband shall be entitled to hold one-half part of all her real estate after the payment of all her just debts for and during the term of his natural life.

"SEC. 6. That any married woman may release to her husband the right to control her property, or any part of it, and to dispose of the income thereof for their mutual benefit, and may, in writing, revoke the same.

"SEC. 7. That all acts and parts of acts inconsistent with this act be and they are hereby repealed.

"*Passed at Dover, April 9, 1873.*"

The first section provides, in effect, that all the property, real and personal, which a woman has at her marriage, or which any woman then married might receive from any one except her husband, should be her sole and separate property, and the rents of her lands should not be subject to her husband's control, or to his debts.

The second provides that her debts at the time of marriage shall be a charge upon her real and personal property to be created by judgment against her in her own name. This provision is an enlargement of her liability by subjecting her to a separate suit.

The third enacts that she may receive her wages for services other than those rendered for her family, and hold and deposit them in her own right, etc.

The fourth provides that she may sue and defend suits at law for the preservation and protection of her property as if unmarried, or may do it jointly with her husband, but he cannot do it by himself: then, it is further enacted that she may make all contracts necessary, *with respect to her own property*, and may sue upon them as if she were a single woman.

The other sections provide that, with her husband's consent she may make a will; that nothwithstanding, he shall have his right as tenant by the curtesy. There is a further provision for a marriage contract and for legalizing it, and one to give the husband one-half his wife's realty for life, if the wife have never had any lawful issue: and another which was in part unnecessary, and in

other part is, in a legal sense, unintelligible. The one next to the last provides that the wife may release to her husband the most valuable of the foregoing provisions, for their mutual benefit; but may revoke such release.

The first section of the last mentioned act was stricken out by the act of 1875 (15 vol. of the laws, 289) and the following substituted for it, "That the real and personal property of any married woman which has been heretofore acquired, is now held, or which she may hereafter acquire in any manner whatsoever from any person other than her husband, shall be her sole and separate property, and the rents, issues and profits thereof shall not be subject to the disposal of her husband, or liable for his debts." By this all the property, present and prospective, of a married woman, is her separate property, and beyond the control of her husband or his creditors. There are other provisions of the act, but it is not material to speak of them here.

I have now given you the law with respect to married women, according to the common law system, and the provisions of the statutes of the State modifying that law. The question is whether the status of the plaintiff in this action, is such as to authorize her to bring this action. If it is not, then clearly she is not entitled to recover from the defendant.

While it is true as a general proposition that statutes in derogation of, or repugnancy to, the common law, are to be construed strictly, and nothing is to be intended in aid of them, except what is clearly imported by their language; yet, where they are of a remedial character (as the acts in question must be taken to be) the rule does not so rigidly apply. But at the same time, the language of such acts, where there is any bearing upon the question, is not to be wrested from its connection, or an imaginary meaning given to it, to make it subserve the ends of free interpretation.

The act first passed clearly gives no right to a married woman to sue in a court of law at all. That of 1871 gives the right to sue, only to married women living in a state of separation from their husbands. The statute of 1873 by the third section gives a married woman the right to sue for wages earned by her outside of her family; and the fourth gives her the right to sue and defend alone, at law or in equity, for the preservation and protection of

her property, or she may join her husband in the action. She is also allowed to make all necessary contracts with respect to her own property, and to sue upon them as if she were single. There is not any other clause or expression which gives a married woman the right to sue without her husband, as a joint plaintiff, to be found in our statute book. (I may say, that the provision giving a married woman the right to sue in equity with respect to her separate property without her husband, was unnecessary.) Where then, is the law which supports the action brought in this case? The plaintiff is not suing for wages earned by her while living apart from her husband, for it does not appear that since her marital life commenced, she has ever lived otherwise than with him: nor for debts contracted and liabilities incurred to her during separation: nor for the preservation and protection of her property; nor for the breach of any contract necessary to be made and which she had made with respect to such property. If there are any other causes of action for which she may sue except those I have mentioned, I have failed to discover them, in reading the several acts mentioned. Clearly then, if the plaintiff's case cannot be brought within some one or more of those provided for, her suit cannot be sustained; for the Courts of this State are not yet open for the prosecution of whatever suits a married woman chooses to bring.

The claim of the plaintiff, as set forth in the declaration, is of three kinds. One is on an alleged special agreement to buy the goods of her husband at the constable's sale for her benefit—that is, they to be her's when she paid for them; as they were afterwards sold by the defendant, she claims the difference in the respective prices, being the sum of $820.12, the goods having been bought for $459.00 in November, 1875, and sold for $1,279.12 the 16th of December, 1879. Another is for her work and labor alleged to have been performed for the plaintiff from the 25th of March, 1876 till the 28th of December, 1879, when her husband ceased to occupy the premises which the defendant, from said first mentioned day, had held as tenant under Mr. Henry du Pont. These services she estimates as worth seven dollars a week all that time. The remaining item of claim is for poultry, butter, eggs and other country products which she testifies were furnished to the defendant and his family for their diet during all the period afore-

said: if I recollect her testimony the value of these articles, as supplied in the average every week, was $3.00. The service of the defendant upon the farm occupied by her husband with his family, was testified to by another witness besides the plaintiff, as was also delivery at times of the farm products, by one also speaking on her side. She claims interest upon these items. She supports her claim for the difference in the sale of the goods at the several times, by what is claimed as proof of her ownership, that is, that the defendant at the constable's sale proclaimed that he was bidding off the property for her benefit and not his own.

In reply to all the above the defendant answers by admitting his declarations at the constable's sale, and that it was understood she should have the goods when she paid for them; but he insists that she never did pay for them, and therefore acquired no title to them. He admits delivery of farm products, that is marketing, to him; but says, it was oftener done by her husband than her; and he does not dispute that she performed upon the farm the services of a farmer's wife. He sets up, however, to these different claims, the following defences. With respect to the first claim—that of the difference—that having failed to pay for the goods sold, she had no title to them: that the payment claimed by her through the delivery of marketing, and the performance of work and labor for him, have no foundation in contract with her of any kind. In support of the latter objection, he has proved before you, and they are in evidence, and being in writing cannot be gainsaid for what they are, four different agreements between the husband and the plaintiff and himself by which such husband agreed to work the aforesaid farm and find all the labor, including his own that of his family, necessary therefor, for the sum of one hundred dollars for the first year, he being allowed the privileges set forth therein. Afterwards the sum was lowered to fifty dollars a year upon the defendant's representation, which he has produced his memorandum before you to establish, that he was losing money by holding the farm.

It is not pretended by the plaintiff that any contract was ever actually made between her and the defendant about paying for these goods in any other way than with money—she, at the time she applied to the defendant to buy them in at the sale, expecting, as she told him, according to his testimony, to receive about one thousand

dollars upon some claim she had in Kent, or in the hands of her lawyer there: but she asks you to infer such a one from the fact of the work done at the farm and the marketing delivered. This is opposed by the defendant, who points to the agreements before mentioned as showing that the work done by her was part of the work of the family upon the place, stipulated for by them, and what his rights were in the matter of sale of marketing. He claims that the marketing delivered him belonged to him as much as the grain and hay raised on the land; that as none of it was paid for, the groceries, etc., provided for in the agreements were necessarily paid for by sales to other persons. It is not pretended on the plaintiff's part, that all the marketing taken from the farm was delivered to the defendant.

The learned counsel for the plaintiff objected strongly to the introduction of these agreements between her husband and the defendant in evidence before you; but the Court admitted them, and we think them proper to be submitted to you and instruct you to consider them as part of the testimony which you are to deliberate upon.

And now, with respect to those agreements, we have to say to you that it was perfectly competent for Isaac Engle Valentine and the defendant to make them, and there is no more ground for their exclusion because the former is her husband, than if they being relevant testimony, had been made by any one else. The husband had the right to make them, and to stipulate for the services of his family including his wife: for notwithstanding the legislation quoted, the husband is still the head of his household, the several members of which are under his lawful control. Whatever therefore a wife does, in the performance of the duties devolving upon her as such (as all of you no doubt know what they are in the case of a farmer's wife in good health) cannot be looked upon otherwise than as her wifely service, for which her best compensation must always be the consciousness that she has done her part. No contract to pay for them, can ever be implied against a landlord; but can only arise by express engagement.

I know of nothing else to be said in explanation of the case before you; for I am quite sure you are able to see exactly what it is. The right of the plaintiff to sue upon the facts presented, is a

question of law for the Court; and we say to you, that the plaintiff has not shown a case which brings her within any one of the enabling clauses of the married woman legislation, as I have cited them to you.

Verdict for defendant.

COURT OF ERRORS AND APPEALS,

JANUARY TERM,

1887.

PATRICK NEARY, Collector, etc., *Appt. v.* PHILADELPHIA, WILMINGTON & BALTIMORE R. R. CO.

Construction of Statute—Commutation of Taxes—Taxation of Roadbed of Railroad.

The tax laid and collected by the Levy Court in each county for county purposes, is nevertheless a State tax, being levied by authority of the State.

Legislative Acts are to be read, understood and interpreted according to the plain meaning and ordinary import of the language employed in them.

The roadbed of the P. W. & B. Railroad in this State is "real property" and as such subject to taxation for county purposes, unless specifically exempt therefrom by Act of Assembly.

In the construction of statutes where any cause of doubt arises, although apparently the doubt attaches only to a particular clause, the whole statute is to be taken together to arrive at the legislative intent; and if possible such a construction is to be made as will avoid any contradiction or inconsistency; and it is the duty of the courts, as far as practicable, so to reconcile the different provisions as to make the whole Act consistent and harmonious. If this becomes impossible, then the court must give effect to what was manifestly the intention of the Legislature although by so doing it may restrict the meaning or application of general words.

It is the meaning and intention of the Act of April 11, 1873 (Laws of Delaware, Vol. 14, page 339) that the sums stated therein, when paid by the Philadelphia, Wilmington & Baltimore Railroad Company to the State Treasurer, should be in lieu of all taxes which might thereafter become due from said company in each year under all laws of this State subjecting said company to taxation for the benefit of the State or any part of it; including taxation upon its roadbed or right of way in a county for county purposes under the general law of the State.

(*March 9, 1887.*)

APPEAL from a decree of the Court of Chancery, in favor of complainant in a bill in equity to restrain the collection of taxes assessed against complainant. *Affirmed.*

In the Court below, SAULSBURY, CHANCELLOR, delivered the following opinion:

It is stated in the bill, and admitted by the answer filed in this cause, that so much of the road bed of the main line of railroad and the several sidings and branches thereof, belonging to and operated by the complainant, as is located within the territorial limits of the second or northern district of Wilmington Hundred, has been assessed for county purposes for the year 1885, at a valuation of $54,282, and that certain real estate within the said district belonging to the said Corporation has likewise been assessed for like purposes, for the same year, at a valuation of $700.

The Levy Court of New Castle County has laid and apportioned a tax upon the said assessments as follows: a tax at the rate of twelve cents upon every $100 thereof, as and for the poor tax; and a tax at the rate of thirty-eight cents upon every $100 thereof, as and for a county tax, making the aggregate a tax at the rate of fifty cents upon every $100 of the said assessment.

The aggregate amount of the taxes so laid and apportioned as aforesaid is $279.55, and whereof $271.41 are rated and apportioned upon the sum of $54,282, the valuation of the road bed or right of way; and $8.04 are rated and apportioned upon the sum of $700, the valuation on certain real estate of the complainant located within said collection district, not being a part of or connected with the said road bed or right of way.

The complainant seeks to enjoin the collection of said taxes, by the defendant, collector of said collection district, upon two grounds: 1, That by the payment of a gross annual sum, it is expressly exempted from all other taxes until the Legislature shall otherwise direct; and 2, That as to so much of the said tax as is assessed upon a valuation of its road bed, there is no authority of law for such assessment.

The second ground, in my opinion, is untenable; and I decline to adopt the rulings in the cases cited from the Massachusetts

and Pennsylvania Reports upon this subject, as properly applicable in this State. Numerous contrary decisions are to be found in the reports of other States, and more consonant with our own laws applicable to this subject.

By section 1, chapter 11, of our Code, it is provided that "All real and personal property not belonging to this State or the United States, or any county, church, religious society, college or school, or to any corporation for charitable uses shall be liable to taxation and assessment for public purposes."

The road bed of the complainant is real property and does not come within any of the exceptions contained in chapter 11 of the Code, and is liable to taxation and assessment for public purposes, unless exempted by the provisions of some other Act of the General Assembly of this State.

And this brings me to the consideration of the true interpretation of the Act of April 11, 1873.

That Act is entitled "An Act Relating to the Taxes of the Philadelphia, Wilmington & Baltimore Railroad Company."

The first section is as follows: "That the treasurer of the State be, and he is hereby, authorized and directed to accept and receive from the Philadelphia, Wilmington & Baltimore Railroad Company, in the year of our Lord, 1873, and in each and every year thereafter, until otherwise directed by the Legislature, the annual sum of $27,000, to be paid in equal quarterly payments, on the first day of July, October, January and April of each year, the first payment to be made on the first day of July next, in lieu of all taxes which may hereafter become due from said Company in each year, as aforesaid, under any and all laws of this State, except such taxes as may become due under the provisions of an Act entitled 'An Act to Raise Revenue for This State,' passed August 11, 1864."

By the second section it is provided that "Upon the payment by the said Philadelphia, Wilmington & Baltimore Railroad Company, to the treasurer of the State, of the said sum of $27,000 in equal quarterly payments as aforesaid in any year, it shall be the duty of the said State treasurer, and he is hereby authorized, to execute and deliver to said Company a proper acquittance and discharge from the payment of all taxes due or to become due in the

year for which such payment shall have been made, except the taxes due or to become due under the provisions of the aforesaid Act entitled 'An Act to Raise Revenue for the State,' passed August 11, 1864."

The counsel for the defendant, in his very ingenious and plausible argument, arrived at the conclusion that the taxes for which exemption is given in this Act are special taxes, laid upon the Company by special Acts of General Assembly; and that the Acts referred to in the Act of 1873, are such Acts as by their very terms impose taxes and for State purposes; and he sought confirmation of his construction by a consideration of the provision of the third section of the Act of 1873. That section is as follows:

"That nothing in this Act shall be construed to repeal, modify, or in any manner affect any existing law imposing taxes upon the said Company, otherwise than to suspend a collection of such taxes in any year in which the said Company shall pay to the State treasurer the amount specified in this Act; nor shall the provisions of this Act, or anything herein contained be construed into a contract exempting the said Company from the payment of such taxes as the Legislature of this State may hereafter impose upon said Company."

He contends, also, that the payment by the Company of other taxes strengthens this construction and that the Legislature has given a construction to the same effect by the passage of the Joint Resolution of April 11, 1883.

I cannot agree with the counsel for the defendant in some of these respects, but must interpret the Act of 1873 according to its own provisions. It is true that the State treasurer has not, under his general authority, power to execute and deliver acquittances and discharges from the payment of mere county taxes; but it does not follow that the Legislature of the State may not, by law, except a corporation from the payment of all taxes which may become due from it in each year under any and all laws of the State, or that it may in such Act of exemption except such taxes only as it shall see proper to except.

The Levy Court of a county can levy a tax only by virtue of some law of the State. The collector of a county tax can collect such tax only by virtue of some law of the State; and I think

there can be no doubt that the Legislature may, if it chooses so to do, for any purpose which it may deem beneficial to the State, in consideration of the payment of a sum in gross by any corporation or person, natural or artificial, authorize the acceptance of such sum in gross, in lieu of all taxes which may thereafter become due from said person natural or artificial, under any and all laws of the State, and may except such taxes only as may become due under the provisions of any Act which it may choose to designate.

The only effect which can be given to the third section is that while the sum in gross should be paid to the state treasurer in lieu of all taxes under any and all laws of the State shall be continued to paid to the state treasurer, the payment of other taxes shall be suspended; but that the provisions of the act or anything therein contained shall not be construed into a contract exempting the company from the payment of such taxes as the Legislature might thereafter impose upon the Company.

The Joint Resolution referred to in the argument does not operate as a legislative construction of the Act of 1873, but only as a commutation of taxes due and in arrear, upon the basis therein named. The Joint Resolution referred to was adopted by the Legislature April 19, 1883, more than ten years after the passage of the Act of 1873; and there can be no doubt that the Legislature of 1883 supposed that the Act of April 11, 1873, had reference only to taxes imposed by the Act of April 8, 1869; for in the preamble to the joint resolution, they say:

"*Whereas*, By an Act of the General Assembly, passed at Dover, April 11, 1873, the state treasurer was directed and empowered to receive from the Philadelphia, Wilmington & Baltimore Railroad Company the sum of $27,000 annually in lieu of all taxes against said Company, under the Act of April 8, 1869, by equal quarterly installments; therefore, be it resolved," etc.

I have no doubt it was the intention of the Legislature of 1883 to place all railroad corporations and canal companies of the State upon an equal footing in respect to taxation; for in the fourth resolution they say:

"That when any such company shall have fully complied with and conformed to the requirements of the preceding resolve, the state treasurer shall thereafter accept and receive from each of the

said companies by equal quarterly payments in each year commutation of the taxes under the Act of April 8, 1869, on the basis hereinbefore stipulated."

If they failed to secure this equality it was by interpreting the Act of April 11, 1873, as having particular reference to the Act of April 8, 1869, and not to any and all laws of this State except the Act of August 11, 1864.

The first and second sections, before recited, of the Act of April 11, 1873, are to be interpreted by the clear meaning of the words of the Act as used, and not by conjecture, warranted perhaps by circumstances *dehors* the Act.

If the Legislature had intended to except any taxes other than those which might become due under the provisions of an Act to raise revenue for this State, passed August 11, 1864, it is reasonable to suppose that they would have said so in the Act, and it was their plain duty so to have said. They have in fact, however, excepted only such taxes as may become due under that Act, and afterwards in the fifth section provided "That if the said Philadelphia, Wilmington & Baltimore Railroad Company may desire to pay to this State a gross sum of $13,000 in lieu of the said tax provided for in said chapter 458, Vol. 12, Laws of Delaware (being the same Act which they had before excepted, passed August 11, 1864), in semi-annual installments on the first day of October and the first day of April in each and every year, it shall be the duty of the state treasurer to receive the said amount from said Company, in lieu of said tax, until otherwise directed by the Legislature of this State.

It is not for the judiciary to limit and restrict the plain and unambiguous language employed by the Legislature in their enactments, but to give to the words used in such enactments, a plain, fair and reasonable construction. It is for the court to declare the meaning of an Act of the Legislature, and not to usurp the functions of the Legislature by presuming to make law contrary to that made by the law-making power.

I, therefore, decide in this case, that when the Legislature, by the first section of the Act of 1873, declared that the treasurer of the State be and he is hereby authorized and directed to accept and receive from the Philadelphia, Wilmington & Baltimore Railroad

Company in the year of our Lord, 1873, *until otherwise directed by the Legislature*, the annual sum of $27,000, to be paid in equal quarterly payments on the first day of July, October, January and April of each year, the first payment to be made on the first day of July next, in lieu of all taxes which may hereafter become due from said Company in each year as aforesaid, under any and all laws of this State, except such taxes as may become due under the provisions of an Act to raise revenue for this State, passed August 11, 1864, and that the said Company having paid said sum to the said treasurer, according to said Act as appears by the acquittance and discharge of the said state treasurer, filed in this cause, the said Company became and was discharged from the payment of all taxes due in the year for which such payment was made, except the tax due or to become due under the provisions of the Act entitled "An Act to Raise Revenue for This State," passed August 11, 1864, and that when the said Company paid a gross sum of $13,000 in lieu of the said tax due under the provisions of the aforesaid Act entitled "An Act to Raise Revenue for This State," passed August 11, 1864, such payment operated as an acquittance and discharge in lieu of all taxes under any and all laws of this State.

This opinion is confined to the special matter before me, namely; the tax levied and appropriated by the Levy Court of New Castle County as stated in the bill of complaint in respect to the road bed of the said Company, complainant, and is not to be understood as applying to the other real estated owned by the company, not a part of said road bed as mentioned in said bill.

This limitation I consider proper, because the legislation upon this subject must have a reasonable and a fair construction; and it is not to be presumed that the Legislature intended that the Company should be exempted from taxation in respect to property which it might become possessed of as owner and not necessarily incident to the right of operating its railroad. If the Company became the owner of property disconnected with its road and its operation, which property would be taxable if owned by natural persons—would be subject to taxation—it is not to be presumed that it was the intention of the Legislature to exempt such prop-

erty from liability to taxation simply for the reason that the complainant became the purchaser and owner thereof.

Before the counsel in the cause proceeded in their arguments I intimated to them that I should dissolve the preliminary injunction heretofore awarded and dismiss the bill, unless the case was brought under some recognized head of equity jurisprudence, as where there would otherwise be a cloud upon the title or a multiplicity of suits or any irreparable injury.

The ordinary remedies in the case of taxes illegally assessed and levied are an action at law after a compulsory payment either of trespass against the collecting officer, or of assumptsit against such officer or the public corporation to which the amount has been paid.

These remedies, says *Pierce on Railroads*, 488, are ordinarily ample and do not involve the public embarrassments incident to the intervention of equity in such cases.

Equity will not therefore enjoin the collection of a tax alleged to be illegal, where there is an adequate remedy at law. It will not interfere by its preventive process on account of mere irregularities, hardship and injustice in the assessment, or errors or excess in valuation.

It would be impossible, if I were to attempt it, to reconcile the various and conflicting decisions which have been made by the courts in the different States upon the subject of equitable jurisdiction in such cases.

This want of uniformity of decisions in this country has arisen from the want of distinct equitable tribunals to adjudicate such questions and from the blending of legal and equitable powers in the same tribunals.

The principles I have announced upon this subject will govern my actions whenever similar questions shall arise before me.

The solicitors for the parties respectively have filed among the papers in the cause an agreement which is in the following words: "It is agreed and understood that there are divers other taxes assessed against the corporation complainant, and other corporations owning like property in the County of New Castle, in the hands of several other collectors in the said County of New Castle for collection, and that in order to avoid a multiplicity of suits, and prevent un-

reasonable litigation, it has been agreed that these facts are to be taken to be admitted in this case with the like effect as if the same had been stated in the bill of complaint, and admitted by the answer. And it is also agreed and understood and so stipulated that this cause shall be considered just as though all the parties who are in like case as the complainant and defendant had been parties thereto."

I have not given any weight to the suggestion made by the counsel for the complainant: that the tax imposed would affect commerce among the States, and impede the transit of persons and property from one State to another. It does this in the language of Mr. Justice Fields in the case of *Minot v. Phila. etc. R. R. Co.*, 18 Wall., 232 [85 U. S. bk. 21, L. ed. 896], "just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality." "As was very justly observed," he remarks, "by this court in a recent case, 15 Wall., 293 [82 U. S. bk. 21, L. ed. 167], 'every tax upon personal property, or upon occupations, business or franchises, affects more or less the subjects and the operation of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.' The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate a tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress."

The agreement referred to by counsel having been filed, and having for that reason taken jurisdiction of the cause, I shall, for the reasons before stated, decree that the preliminary injunction heretofore granted restraining the defendant from collecting the sum of $271.41 rated and apportioned upon the sum of $54,282 the valuation of the road bed be made perpetual, and that the said preliminary injunction be dissolved as to the sum of $8.04 rated and apportioned upon the sum of $700, the valuation on the other

real estate of the complainant located within the collection district mentioned in said bill; and it is ordered that the parties complainant and respondent, each pay one-half of the costs in this cause within three months, or attachment.

The case was heard in this court at the January Term, 1887, before COMEGYS, CH. J., WOOTEN,* HOUSTON and GRUBB, JJ.

The Act in question is fully set out in the opinion of HOUSTON, J.

John H. Rodney and *Edward G. Bradford*, for appellant:

This case involves only two main questions, viz.:

1. Assuming that the real estate of the corporation respondent is liable to assessment and taxation under the general laws regulating county taxation, in the absence of any specific statute or statutes exempting the same therefrom, is there any such statute or exemption?

2. If there is no such statute, is there any general rule or principle of law exempting either the whole or any part of the real estate of the corporation respondent from such taxation?

The same rule applicable to the construction of a contract applies to a statute. It should be considered as a whole and the real intent of the Legislature thus ascertained.

Sedg. Stat. Const. Law, § 238.

Further, it is a well established principle of the interpretation of laws exempting from taxation, that any doubts as to the scope of the enactments should be resolved in favor of the taxing power, as the surrender of that power should be by clear, unambiguous terms, admitting of no reasonable construction consistent with the reservation of the power.

Cooley, Tax., 146; Sedg. Stat. & Const. Law, § 344; *Delaware R. R. Tax*, 18 Wall., 206, 225 (85 U. S. bk. 21, L. ed. 888, 894); *Philadelphia, etc., R. R. Co. v. Maryland*, 10 How., 376, 393 (51 U. S. bk. 13, L. ed., 461, 468); *Bailey v. Magwire*, 22 Wall., 215, 226 (89 U. S. bk. 22, L. ed., 850, 852); *Southwestern*

* Hon. Edward Wootten died after the argument and before the decision of this case.

R. R. Co. v. Wright, and *Vicksburg R. R. Co. v. Dennis*, 116 U. S., 236, 251, 665, 667 (Bk. 29, L. ed., 628, 770.)

Section 3 of the Exemption Act of April 11, 1873, provides that nothing in the Act shall be construed to repeal, modify, or in any manner affect any existing law imposing taxes upon the said Company, otherwise than to suspend a collection of said taxes, in any year in which the Company shoud pay the $27,000; nor should that Act be construed into a contract exempting the said Company from the payment of such taxes as the Legislature of this State may hereafter impose upon said Company.

Thus, the exemption from taxation which the Company can lawfully claim is restricted to law or laws existing April 11, 1873, and "imposing taxes upon the said Company." How, then, is it possible that the exemption can extend to county taxation of real estate for county purposes?

Section 1, chapter 11, Rev. Code, 1874, provides, as heretofore shown, that "All real and personal property, not belonging to this State, or the United States, or any county, church, religious society, college or school, or to any corporation for charitable uses shall be liable to taxation and assessment for public purposes."

The law does not even provide that real estate shall be taxed. It authorizes taxation, but imposes no tax.

Rev. Code, 63, chap. 8, § 18.

Further, it is by law the duty of the Levy Court on or before the first Tuesday of April in every year to cause to be issued to the collector of each hundred a duplicate of the assessment list of the hundred of which he is collector, with a warrant for the collection of taxes.

Rev. Code, chap. 8, § 18.

It is by law the duty of the collector to pay to the county treasurer the county tax as follows: one-third by the first day of July; one other third by the first day of October; and the residue, after deducting comissions and delinquencies, by the first Tuesday of February next after his appointment.

Rev. Code, chap. 12, § 7.

The Levy Court has by law a discretion vested in it to "order payment of all or any of said taxes, at an earlier day than those appointed."

Rev. Code, chap. 12, § 8.

It is impossible to harmonize the operation of the Act of 1873, upon the construction contended for on behalf of the Company with the provisions of law above referred to; for under the above provisions the collector has full power to collect from the Company before July 1, the whole tax assessed against it, and may be directed to do so by the Levy Court.

Yet, under the Act of 1873 the Railroad Company need not elect until July 1, to pay the said $27,000 or any part thereof to the State treasurer. Further, as appears above, it is by law the duty of the collector to pay to the county treasurer the county tax in full by the first Tuesday of February next after his appointment at the latest. It is also the duty of the collector, on the first Tuesday of March next after the date of his warrant, to "render to the Levy Court a true account of all taxes it was his duty to collect, and of all payments made, and of all delinquents."

Rev. Code, chap. 12, § 10.

And the collector is expressly forbidden to collect or receive any tax allowed as delinquent; but the same shall be extinguished, it being provided that the delinquent list shall be settled and allowed at the March meeting of the Levy Court.

Rev. Code, chap. 12, § 18, chap. 8, § 21.

Yet the last installment of the $27,000 does not become due and payable until April 1, or after the time limited for the allowance of the delinquent list has expired; And until the last installment has been paid *non constat* that there will be commutation of taxes; for it requires the payment of the full sum of $27,000 to work that result.

It is submitted that, on the ground of consequences, the construction contended for on behalf of the Railroad Company should be rejected.

U. S. v. Kirby, 7 Wall., 482, 486 (74 U. S. bk. 19, L. ed., 278, 280.)

The legislation of this State furnishes means outside of that Act for gathering its true intent, such as the Resolution of April 19, 1883. It is a well settled rule of construction that statutes *in pari materia* are to be construed together, in order to ascertain the legislative intent.

Sedg, Stat. & Const. Law, 247, 252, 253; Cooley, Tax. 2; *U. S. v. Freeman*, 3 How., 556, 565 (44 U. S. bk. 11, L. ed., 724, 728.)

George V. Massey, for appellee:

The power of the Legislature to exempt corporations and their property from taxation, in whole or in part, for limited periods or permanently, cannot now be seriously questioned.

Delaware R. R. Tax, 18 Wall., 225 (85 U. S. bk. 21, L. ed., 894); *State v. Bank of Smyrna*, 2 Houst., 99; *Home for the Friendless v. Rouse*, 8 Wall., 430 (75 U. S. bk. 19, L. ed., 495.)

In the construction of statutes it is a rule of universal application that effect must be given to the words used by the Legislature, if there is no uncertainty or ambiguity in their meaning.

Dwar. Stat., 703; *Priestman v. U. S.*, 4 Dall., 30 (4 U. S. bk. 1, L. ed., 728); *U. S. v. Fisher*, 2 Cranch, 399 (6 U. S. bk. 2, L. ed., 317); *Farrel Foundry v. Dart*, 26 Conn., 376; *Pearce v. Atwood*, 13 Mass., 343; *People v. Utica Ins. Co.*, 15 Johns., 394; *Allen v. Mut. Fire Ins. Co.*, 2 Md., 111; *Opinions of the Juitices*, 7 Mass., 524; *Parkinson v. State*, 14 Md., 184; *Green v. Weller*, 32 Miss., 650; *Capelle v. Baker*, 3 Houst., 354; *Cooley, Const. Lim.*, 72 and notes.

It is only when a statute is ambiguous in its terms that the courts exercise the power of so controlling its language as to give effect to what they may suppose to have been the intention of the law makers.

Holbrook v. Holbrook, 1 Pick., 250; *Bidwell v. Whitaker*, 1 Mich., 469; *Bradbury v. Wagenhorst*, 54 Pa., 180; *Rich v. Keyser*, 54 Pa., 86.

While it is admitted that the courts, in construing a statute where there is ambiguity in its terms, will endeavor to ascertain and give effect to the legislative intent, it is contended that such intent must be found in the statute itself.

Tynan v. Walker, 35 Cal., 634; *Ezekiel v. Dixon*, 3 Ga., 146; *Barker v. Esty*, 19 Vt., 138–9; Cooley, Const. Lim., 72 and notes; *Coffin v. Rich*, 45 Maine, 511; *Bosley v. Mattingly*, 14 B. Mon., 90; *Water Comrs. v. Brewster*, 13 Vroom, 129; *Rudderow v. West*

Jersey Ferry Co., 2 Vroom, 512; *State v. Berry*, 2 Harr. (N. J.), 81; *Sturgis v. Crowninshield*, 4 Wheat., 122 (17 U. S. bk. 4, L. ed., 529.)

It is only the intent of the particular Legislature which enacts the statute that is to govern the courts in the construction thereof. The opinion of a subsequent Legislature upon the meaning of the statute is entitled to no more weight than that of the same men in their private capacity.

Bingham v. Supervisors, 8 Minn., 448; *Dash v. Van Kleek*, 7 Johns., 507.

Any attempt to restrict the general terms of the Act of April 11, 1873, to taxes which appellee is pleased to designate as State taxes cannot be successfully maintained, because all taxes, whether devoted to State or county purposes, are, nevertheless, State taxes, in that they are assessed and collected by authority of the State, and are only apportioned and subdivided for the support and maintenance of the Government in all its several departments.

Camden, etc., R. R. Co. v. Hillegas, and *Camden, etc., R. R. Co. v. Comrs. of Appeal*, 3 Harr. (N. J.), 12, 13, 71–73.

In the light of its charter, the *roadbed, or right of way* of the complainant Corporation, is analogous to a *turnpike*, or the bed of a *canal* with its appurtenances. That as such *roadway* forms part of a continuous line of railroads between the States of Pennsylvania and Maryland, to the formation and establishment of which this State has given its sanction and assent, it constitutes a means and medium of inter-State commerce; and the imposition of a tax upon it specifically is *a regulation of commerce between the States.*

Commonwealth v. Wilkinson, 16 Pick., 175; *Inhabitants of Worcester v. Western Railroad*, 4 Metcalf, 564; *Proprietors of Meeting House v. Lowell*, 1 Metcalf, 538; *Lehigh Coal and Nav. Co. v. Northampton Co.*, 8 Wat. & Serg., 334; *Railroad v. Berks Co.*, 6 Barr, 70; *Schuylkill Nav. Co. Berks Co.*, 1 Jones, 202; *Delaware and Hudson Canal Co. v. Wayne Co.*, 351; *West Chester Gas Co. v. Chester Co.*, 6 Casey, 232; *Carbon Iron Co. v. Carbon Co.*, 3 Wright, 251; *Cape May and Millville Railroad Co. v. Collector Middle Township*, 9 Vroom, 270.

HOUSTON, J., delivered the following opinion:

Notwithstanding the elaborate effort of the learned counsel for the appellant to raise a doubt as to the meaning and intention of the Legislature in passing the Act of April 11, 1873, entitled "An Act Relating to the Taxes of the Philadelphia, Wilmington & Baltimore Railroad Company" (Rev. Code, 44), and the long array of authorities cited in support of their contention that it could not have been intended by the Legislature to have any relation to a county tax levied, assessed and imposed by the Levy Court of New Castle County, upon the roadbed or right of way of the Company located within the northern or second collection district of Wilmington Hundred, in that county, or to any other tax than a State tax, or State taxes specifically imposed as such upon the Company by some existing law on the subject, I must confess that I have been utterly unable to discover any reasonable ground whatever for such a doubt on a perusal of the plain and simple words of the Act itself.

All written contracts, as well as legislative Acts, are to be read, understood and interpreted according to the plain meaning and ordinary import of the language employed in them. One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement, so far as it can be done without infringing upon any law of superior binding force. In regard to cases where this intention is clearly expressed there is little room for variety of construction; and it is mainly in cases where the intention is indistinctly disclosed, although fairly presumed to exist in the minds of the parties, that any liberty of construction exists.

Words, if of common use, are to be taken in their natural, plain, obvious and ordinary signification; but if technical words are used, they are to be taken in a technical sense, unless a contrary intention clearly appears in either case from the context. All instruments and agreements are to be so construed as to give effect to the whole or as large a portion as possible of the instrument or agreement. 1 Bouv. Law Dict., 337, 338.

With these rules of construction before us, turning to the Act in question, and assuming as the counsel for the appellant have, that the real estate of the corporation respondent is liable to assess-

ment and taxation, under the general laws regulating county taxation, in the absence of any specific statute or statutes exempting the same therefrom, is there any difficulty in promptly answering in the affirmative the question formally propounded by them in the first paragraph of their printed brief? I must say, with all due respect to them, there is none whatever in my opinion.

The first Act of the Legislature, that of Chapter 11, Rev. Code, 84, subjecting the real and personal estate of the Corporation to taxation and assessment for public purposes, was the general statute for that purpose, and was in force when the Company was incorporated and its railroad was constructed and put in operation under its charter in and across this State. The other three Acts referred to passed prior to the particular Act now in question, that of April 11, 1873, entitled "An Act Relating to the Taxes of the Philadelphia, Wilmington & Baltimore Railroad Company" (Rev. Code, 44), were passed long after the general statute first before referred to, and were as follows: the Act of August 11, 1864, entitled "An Act to Raise Revenue for this State" (Rev. Code, 29, 30), imposing a passenger tax of ten cents for each passenger carried by the Company; the Act of April 8, 1869, entitled "An Act Taxing Railroad and Canal Companies in this State," which required them to pay to the State, in addition to the taxes already imposed on such companies by the laws of the State, an annual tax upon the net earnings or income received by them from all sources during the preceding year, and a tax upon their rolling stock, and also a tax upon the actual cash value of the capital stock of such companies (Rev. Code, 41); and chapter 7 of the Revised Code, which imposed an annual tax of one quarter of 1 per cent upon the capital of the Company.

Such were the statutes and such were the various taxes, all told, to which the corporation respondent was subject when the Act of April 11, 1873, relating to the taxes of that corporation, was passed on that day. It is as follows:

"Sec. 1. That the Treasurer of the State be and he is hereby authorized and directed to accept and receive from the Philadelphia, Wilmington & Baltimore Railroad Company in the year of our Lord 1873, and in each and every year thereafter, until otherwise directed by the Legislature, the annual sum of $27,000, to be

paid in equal quarterly payments, on the first day of July, October, January and April, of each year, the first payment to be made on the first day of July following, in lieu of all taxes which may hereafter become due from said Company in each year, as aforesaid, under any and all laws of this State, except such taxes as may become due under provisions of an Act entitled 'An Act to Raise Revenue for this State,' passed August 11, 1864."

"Sec. 2. That upon the payment by the said Philadelphia, Wilmington & Baltimore Railroad Company to the Treasurer of the State of the said sum of $27,000 in equal quarterly payments as aforesaid, in any year, it shall be the duty of the said state treasurer, and he is hereby authorized to execute and deliver to said Company a proper acquittance and discharge from the payment of all taxes due or to become due in the year for which such payment shall have been made, except the tax due or to become due under the provisions of the aforesaid Act entitled 'An Act to Raise Revenue for this State,' passed August 11, 1864."

"Sec. 3. That nothing in this Act shall be construed to repeal, modify or in any manner affect any existing law imposing taxes upon the said Company, otherwise than to suspend a collection of said taxes in any year in which the said Company shall pay to the state treasurer the amount specified in this Act; nor shall the provisions of this Act, or anything herein contained, be construed into a contract exempting the said Company from the payment of such taxes as the Legislature of this State may hereafter impose upon said Company."

"Sec. 4. That if the said Philadelphia, Wilmington & Baltimore Railroad Company, or any other railroad company in this State shall either as the operator of its own railroad or railroads, or as lines of other railroads within this State, charge and receive a greater rate per mile for the carriage of passengers (except so far as the same may be increased to the amount of the tax annually paid under the provisions of chapter 458, Vol. 12 of the Laws of Delaware) or for the carriage or transportation of goods, wares or merchandise or other property whatsoever from place to place within this State, or from a place within the State to a place without the State, than is charged by such company for the carriage of passengers and the transportation of property or freight for like

distances or per mile from places without the State to places within the State, or from places without the State through the State to other places without the State, the person or persons paying such charges, either as fare or freight, shall be entitled to recover from such company so charging and receiving the same a sum tenfold the amount of the money so paid, to be recovered in an action of debt or assumpsit, as like amounts are now recovered by law."

"Sec. 5. That if the said Philadelphia, Wilmington & Baltimore Railroad Company may desire to pay to this State a gross sum of $13,000 in lieu of the said tax provided for in the said chapter 458, Volume 12, Laws of Delaware, in semi-annual installments, on the first day of October and the first day of April, in each and every year, it shall be the duty of the State treasurer to receive the said amount from the said Company in lieu of said tax until otherwise directed by the Legislature of this State; but nothing in this section shall be construed to repeal, modify, or in any manner affect the provisions of said chapter 458, Volume 12, Laws of Delaware, otherwise than to suspend the collection of said tax for any year in which the said Company shall pay the gross amount aforesaid in the manner aforesaid in lieu of said tax; and nothing herein shall be construed as a contract exempting the said Company from such taxation as may hereafter be imposed by law."

Applying the leading principle of construction before stated (which is, to carry out the intention of the authors of or parties to the instrument or agreement, and that where the intention is clearly expressed, there is little room for a variety of construction, and that the words used, if of common use, are to be taken in their natural, plain, obvious and ordinary signification) to the provisions of the Act in question, I have been unable to discover any room for a doubt as to the intention of the authors of and parties to it so clearly expressed in the plain and common words used in it.

The plain and direct import of them is that the State treasurer is authorized and directed by the Legislature to accept and receive from the other party, the Railroad Company, in the year 1873, and in each year thereafter, until otherwise directed by the Legislature, the annual sum of $27,000, to be paid in equal quarterly payments on the first day of July, October, January and April of each year,

the first payment to be made on the first day of July next, in lieu of all taxes which may hereafter become due from said Company in each year, as aforesaid, under any and all laws of this State, except such taxes as may become due under the provisions of an Act entitled "An Act to Raise Revenue for This State," passed August 11, 1864.

This is the first section of the Act and substantially comprises, in perfectly clear and explicit terms, the *aggregatio mentium* of the parties to it; while the second section of it, without varying or changing it in any particular, actually repeats and reaffirms it by providing that upon the payment by the said Railroad Company to the State treasurer of the said sum of $27,000 in equal quarterly payments, as aforesaid, in any year, it shall be the duty of the said State treasurer, and he is hereby authorized to execute and deliver to said Company a proper acquittance and discharge from the payment of all taxes due or to become due in the year for which such payment shall have been made except the tax due or to become due under the provisions of the aforesaid Act entitled "An Act to Raise Revenue for this State," passed August 11, 1864.

And could any form of words or mode of expression be devised to declare in more explicit and unequivocal terms when taken in their natural, plain, obvious and ordinary signification, the meaning and intention of the Act, and of both of the parties to the agreement made and concluded by it, to be that the said sum of $27,000, when so paid as aforesaid by the said Company to the State treasurer in the year 1873, commencing the quarterly payments on the first day of July in that year, and in each and every year thereafter, until he should be otherwise directed by the Legislature in regard thereto, should be in lieu of, or in exchange for, all taxes which might thereafter become due from the said Company in each and every year, as aforesaid, under any and all laws of this State, except such taxes as should become due under the provisions of the Act, entitled "An Act to Raise Revenue for this State," passed August 11, 1864.

And here I may add that the special exception of this Act from the operation of the agreement only the more conclusively shows that it was the intention of the statute in question and of the parties to the agreement made and enacted into a law for the

government of both the State and the Company, in relation to the subject matter of it, as provided for in it, that every other tax law to which the Company was then subject or might thereafter be attempted to be made subject, should be included in and covered by the agreement, according to the maxim of law, *exceptio probat regulam de rebus non exceptis*—An exception proves the rule, concerning things not excepted—and the further maxim on the same subject, *Exceptio quæ firmat legem, exponit legem*—An exception which confirms, expounds the law.

The main object of the statute, as well as the express words of it in all the provisions of it relating to that object, was to authorize the Company, during the will and pleasure of the Legislature, to pay to the State treasurer thereafter annually the sum of $27,000 as therein stipulated and agreed upon, in lieu of, and in commutation of, all taxes which might thereafter become due from said Company in each year as aforesaid under any and all laws of this State, except such taxes as might become due under the said Act passed August 11, 1864; and furthermore under the fifth section of it to authorize the said Company, if it should thereafter desire to pay to the State a gross sum of $13,000 in lieu of the said tax provided for in said excepted Act passed August 11, 1864, in semi-annual installments, on the first day of October and the first day of April in each and every year, to do so; and to make it the duty of the State treasurer to receive the said amount from the said Company in lieu of said tax until otherwise directed by the Legislature, and which, with the said sum of $27,000, before mentioned in the first and second sections of the statute, would amount to $40,000 per annum; and which sum of $40,000 when paid in any year thereafter as therein provided for, I am also of the opinion was as clearly meant and intended by the plain and unequivocal words of the statute to be in lieu and satisfaction of all taxes which might thereafter become due from the said Company in any year as aforesaid, under any and all laws of the State subjecting it to taxation for the benefit of the State or any part of it.

And as the road bed or right of way of the Company in the Northern or Second Collection District of Wilmington Hundred, New Castle County, was then subject, as real property, to county

assessment and taxation for county purposes under the general law of the State providing for the annual assessment and collection of county taxes, any tax thereafter assessed under it upon the road bed of the Company, as the tax in question in this case was, would be clearly subject, I think, to the provisions of the Act entitled "An Act Relating to the Taxes of the Philadelphia, Wilmington & Baltimore Railroad Company," passed April 11, 1873.

The language of the Act is so broad and comprehensive, expressly declaring that the two sums of $27,000 and $13,000 when paid in any year to the State treasurer by the Company as authorized and provided for in it, should be in lieu of all taxes which might thereafter become due from the Company under any and all laws of the State, that I can find no warrant in the words of it anywhere for the construction contended for by the learned counsel for the appellant that the provisions of it were not intended to apply to a county tax assessed under the general statute and payable to a collector of county taxes, or to any other law than such as specifically imposed, like the other three Acts referred to in the case, a State tax upon the Company to be paid to the State treasurer; first, on the ground, as they earnestly contended, that each of those three Acts was a law of that specific character; and secondly, on the ground, as they also contended, that the words of the third section of the Act required this construction, inasmuch as it provides as follows:

"That nothing in this Act shall be construed to repeal, modify, or in any manner affect any existing law imposing taxes upon said Company, otherwise than to suspend a collection of said taxes in any year in which the said Company shall pay to the State treasurer the amount specified in this Act, nor shall the provisions of this Act or anything herein contained be construed into a contract exempting the said Company from the payment of such taxes as the Legislature of this State may hereafter impose upon said Company."

It is upon the meaning which counsel for appellant choose to give to the word "imposing" and the word "impose" taxes upon the said Company, as they occur in the first three and the last two lines of the section, that they have sought to limit the plain and obvious meaning of the words in the two preceding sections (which

were framed for the direct purpose of declaring and expressly enacting that the State treasurer should accept from the said Company and receipt to it for the said sum specified in them, and when paid to him by the said Company as provided for therein, it should be in lieu of all taxes which should thereafter become due from said Company under any and all laws of this State, except the tax due or to become due under the particular Act therein expressly excepted), by a labored argument to show that the incidental employment of the words "imposing" and "impose" in the third section of it, which was framed and enacted for another and entirely different purpose, could not be intended to apply to and include the general law of the State for the assessment of county taxes, or the tax assessed under it in this case against the road bed of the Company in the collection district mentioned, because it was not a law in which the State imposed, as in the other three Acts specially named in it, the tax upon the Company, but like all county taxes it was imposed by the levy court of the county.

Without entering into any nice or hypercritical consideration of the signification of the word, it is sufficient to say that the Latin word *impono*, from which it is derived, was as generally used in that tongue among the ancient Romans to mean to lay or levy a tax, as the derivative of it in our tongue has since been used in this country and among all English speaking people, to signify the same thing; and from it is also derived the word *impost* in our language, which has scarcely had any other meaning than a tax, however assessed, levied or collected by a government, although it has by usage acquired a more restricted meaning and is now confined in its application to taxes or duties imposed by Government on imports. But any tax authorized by the Legislature of the State, for whatever purpose and however ascertained and fixed in its amount, or which is assessed and collected by the instrumentality provided for it in the Act, is in effect imposed by law on the person who is bound to pay it, whether it be laid directly or indirectly upon him; and it is in accordance with both correct and common usage to so employ the word.

And if the word in this case or in any other admits of two senses or either of the meanings contended for, it is a well settled principle of construction that the meaning which will give effect to

the intention of the parties is preferred to that which will destroy it; more especially where the words themselves, abstractly, may admit of either meaning. *Pugh v. Duke of Leeds*, 2 Cowp. 714.

It was in the power of the Legislature to enter into such an agreement with the Company to accept thereafter from year to year so long as the Legislature should see proper to do so, the said sum of $40,000 annually, and the Company should continue to pay it yearly as provided for in the Act, in lieu of all taxes to be paid by it under any and all laws of the State, and as the Legislature must have been satisfied that it would constitute a fair and just equivalent therefor, I do not think that either the validity or the wisdom of it can be properly objected to, because the whole of the substituted sum is to be paid into the state treasury for the use of the State, in lieu of and to the total exclusion of any county tax on any part of the road bed in New Castle County for the benefit of that county under the general law of the State for the assessment of taxes for county purposes; for the extent to which the county is relieved thereby of State taxes, it is directly benefited by the substitution; while the Act is so framed and expressed that as soon as it ceases to be a fair equivalent for all the taxes to be yearly remitted and released to the Company in lieu of it, the Legislature may terminate the agreement.

I am, therefore, of the opinion that the decree of the Chancellor should be affirmed.

GRUBB, J., concurring:

The question presented for decision upon this appeal is whether or not the decree of the Chancellor is erroneous in so far as it perpetually restrains and enjoins the collection by the appellant, defendant below, of the sum of $271.41, rated and apportioned for the year 1885, upon the valuation of the road bed, or right of way of the appellee, complainant below, for the purposes of county taxation.

The proper determination of this question raises two inquiries, viz:

First, Is there authority of law for the assessment and collection, for the purposes of county taxation, of the said sums rated and apportioned upon the valuation of the said road bed or right

of way, in the absence of any principle of law or specific statute exempting the same therefrom?

Second, If so, is there any principle of law or statute exempting the same therefrom?

There is no authority in law for the assessment and collection of any sum for the purposes of county taxation, upon the road bed of the said appellee, unless the said road bed be included within the terms and operation of the following provisions of chapter 11 of the amended Code, p. 84, viz.:

"Sec. 1. All real and personal property not belonging to this State, or the United States, or any county, church, religious society, college or school, or to any corporation for charitable uses, shall be liable to taxation for public purposes."

That the said road bed is included within the terms and operation of said section 1, and is to be deemed "real property" within the meaning of that term, as used in said section, must be conceded in view of the undeniable weight of authority in this country. *Farmers Loan & T. Co. v. Hendrickson*, 25 Barb., 493; *People v. Brandsley*, 52 Barb., 107; *People v. Cassidy*, 46 N. Y., 46; *Smith v. Mayor*, 68 N.Y., 555; *People v. Comrs.*, 19 Hun., 460; *New Haven, v. Fair Haven*, 38 Conn., 430; *Ill. Cent. R. R. Co. v. McLean*, 17 Ill., 296; *Providence etc. R. R. Co. v. Wright*, 2 R. I., 459; *Philadelphia etc. R. R. Co. v. Bayless*, 2 Gill, 355; *Orange etc. R. R. Co. v. Alexandria*, 17 Gratt., 177.

The Massachusetts and Pennsylvania doctrines that railways are exempt from taxation, upon the ground that they are public works, established by public authority, like canals, turnpikes and highways in those States, is not recognized elsewhere, and should not now be adopted in this State; and cannot properly be in the present case. The said road bed, therefore, being real estate, and as such, liable to taxation for public purposes under the foregoing provisions of section 1, chap. 11, it has been suggested that the imposition of a tax upon it specifically is an unlawful regulation of commerce between the States. This objection was but slightly urged and cannot be sustained since the decisive rulings of the Federal Supreme Court to the contrary in *Delaware Railroad Tax*, 18 Wall. 206 [85 U. S. bk. 21, L. ed. 888], and kindred cases.

It therefore follows that the said road bed of the complainant

below is liable to the collection, by the appellant, of the said sum rated below and apportioned upon the valuation thereof as aforesaid, for the purposes of county taxation, unless there is some principle of law or specific statute, exempting said road bed therefrom.

Strictly public corporations and the governmental divisions of a State are impliedly exempted from taxation with respect to their public property, although its taxation is within the power of the Legislature, because it cannot be presumed that the Legislature intended (in the absence of express legislation so prescribing) that the public should tax itself to raise money to pay over to itself. But this principle of implied exemption does not apply to the case of a business corporation like the appellee, in which the State has no proprietary interest, and whose property is owned and controlled by private individuals for private profit. *Philadelphia etc. R. R. Co. v. Bowers*, 4 Houst., 506, 530; *Delaware Railroad Tax, supra.*

Accordingly, the said road bed of the appellee does not appear to be exempt from the collection of the said sum rated and apportioned upon its valuation as aforesaid, unless there is some specific statute exempting it therefrom. The said appellee contends that it is exempted and discharged from the collection thereof for the purpose of county as well as state taxation, under and by virtue of the provisions of the Act entitled "An Act relating to the Taxes of the Philadelphia, Wilmington & Baltimore Railroad Company" (passed at Dover, April 11, 1873, 14 Del. Laws, p. 339; Amended Code, p. 44), the said appellee having duly paid the prescribed commutation for the said year, 1885, as required by said Act.

The appellant having denied this, the duty of construing said Act is devolved upon this court. Upon examination of this Act it will be found that it is a statute which does not itself impose any tax, but is entirely separate and disconnected from any Act imposing or prescribing a tax and enacted in the exercise of the taxing power. On the contrary it provides for the satisfaction and discharge, upon the payment by the appellee of the commutation money therein specified, of all taxes due or to become due in the year for which such payments shall be made under any and all laws of this State then already enacted in the exercise of the taxing power, except the tax due or to become under the Passenger Tax Act, passed August

11, 1864, for the satisfaction and discharge of which latter tax a further sum of commutation money is prescribed by section 5 of the aforesaid Act of April 11, 1873.

It will be further observed that nothing in said Act of 1873, specifically refers to, or expressly confines its operation to any particular Act or Acts providing for the raising of revenue for the use of the State exclusively. On the contrary sections 1 and 2 of said Act expressly provide that, until the Legislature shall otherwise direct, the payment of the commutation money, as therein specified, shall entitle the appellee to an acquittance and discharge from the payment of *all taxes* due or to become due from said appellee in the year for which such payment shall be made under *any and all laws* of this State, except said Passenger Tax Act.

The words "all taxes" "under any and *all laws* of this State," are surely broad and comprehensive enough to include the laws of the State providing for and prescribing county taxation, while they are certainly so clear and explicit as to exclude any possibility of their ambiguity or any shadow of doubt as to their precise and unmistakable meaning. It would be impossible to find words which more clearly and indisputably express the deliberate intention of the Legislature to discharge the appellee from the payment of every description of tax, both county and state, authorized by any law of this State, except by said Passenger Tax Act.

But it is argued, with great earnestness and logical skill by counsel for the appellant, that the following words of section 3 of said Act, viz.: "Law imposing taxes upon the said Company" and "such taxes as the Legislature of this State may hereafter *impose* upon said Company," indicate that the intention of the Legislature which passed said Act was to limit the operation of said sections 1 and 2 strictly to an exemption and discharge from the payment only of those taxes which were designed exclusively for the support of the State government, and not for county purposes, and which were imposed solely under and by virtue of the provisions of section 2, chapter 7, p. 28, of the Amended Code, and of the Act of April 8, 1869, chap. 392, vol. 13 Del. Laws (Amended Code, p. 41).

The fallacy of this argument is in assuming that the laws of this State, providing for county taxation, are not laws imposing

taxes. By reference to those laws it will be found that it is made compulsory upon the county assessors to assess the real and personal property in the county which, under said Section 1 of Chapter 11, Amended Code, p. 84, shall be liable to taxation and assessment for public purposes; and also compulsory upon the Levy Court in each county to lay road, poor and county taxes, upon said assessments in every year, and cause the same to be collected by the county collectors, who are in their turn compelled to perform that duty.

Under these provisions of law the duty to collect taxes for the support of the county government in every year is as imperatively and directly imposed upon the said county officials as is the duty upon the State treasurer under the provisions of any statute of this State, requiring him to collect taxes designed exclusively for the support of the State government.

And the taxes are none the less imposed by law, because in the former case the amount and rate thereof are required by law to be collected and laid by the Levy Court, while in the latter this is done by the law-making power and specified in the Act prescribing the tax. In either case the tax is "imposed" by law, and in both it is for a public purpose. And, moreover, in both it is a "State" tax, in the sense that it can be imposed by no other authority, and is to be used for the public benefit, whether through the general government of the State, or through the county governments which are State agencies established for the more convenient government of its people. *Camden etc. R. R. Co. v. Coms.*, 3 Harr., (N. J.) 72.

This interpretation of the word "imposed" as employed in the Act under consideration is certainly a fair, reasonable and natural one. But even if it be also susceptible of the construction claimed by the appellant, and could be interpreted to mean a tax whose rate is fixed by the Legislature and expressly specified in the Act providing for said tax, what would be the result? Simply that this particular language of Section 3 of the Act would be ambiguous or susceptible of two constructions; whereupon, the inquiry would arise, which of these two meanings shall prevail.

It is an established rule that where any cause of doubt arises, although apparently the doubt attaches only to a particular clause,

the whole statute is to be taken together and to be examined to arrive at the legislative intent; the different parts reflect light upon each other, and, if possible, such a construction is to be made as will avoid any contradiction or inconsistency; and it is the duty of the courts, as far as practicable, so to reconcile the different provisions as to make the whole Act consistent and harmonious. If this becomes impossible, then we are to give effect to what was manifestly the intention of the Legislature, although by so doing we may restrict the meaning or application of general words. Sedg. Stat. Const. Law, 238.

According to this rule the language of section 3 must be construed in connection with the provisions of sections 1 and 2, in such a way as will, if possible, avoid any contradiction or inconsistency, and so reconcile the different provisions as to make the whole Act consistent and harmonious.

The rejection of the restricted meaning of "imposed" as claimed by the appellant, and the adoption of the other broader and more reasonable one above mentioned, will alone secure this result.

The words of sections 1 and 2 are clear, comprehensive and unambiguous, and, standing alone and without section 3, would, beyond doubt, expressly exempt the appellee from payment of the said county tax upon its said road bed. This much was substantially conceded by the appellant at the argument. But if the meaning of "imposed" contended for by the appellant is to prevail instead of the other broader and more reasonable meaning, then his proposition amounts to this: that an unambiguous section of an Act is to yield to and be controlled by an ambiguous one, and that a reasonable meaning of which the ambiguous provision is susceptible, and which will make the whole Act consistent and harmonious must be rejected, and another meaning adopted which will produce the contrary result. Such a proposition cannot be maintained.

It must be remembered that the provisions of the Act which provide for the exemption and discharge of the appellee from the payment of "all taxes under any and all laws of this State," as prescribed therein, are to be found exclusively in sections 1 and 2 thereof, while section 3 is merely a saving provision against the former sections, to prevent their said provisions from operating as

more than an annual suspension of any existing law imposing taxes upon the appellee, and from being construed into a contract exempting the said appellee from additional taxation by the Legislature in the future.

If the provisions of sections 1 and 2 had expressly provided that the said discharge should be from all "state and county" taxes, and in those very words, with the language of section 3 being as it now stands, it could not be maintained that the laws regarding the assessment and collection of county taxes against the real property of the appellee would not be within the saving provisions of said section 3, notwithstanding the use of said word "imposed." Yet, if the restricted meaning contended for by the appellant should be given to the word, then said saving clauses would not, in such case, embrace any existing or future laws providing for county taxation.

If, therefore, the Act of 1873 is, as the foregoing consideration of it is believed to have demonstrated, clear, explicit and devoid of ambiguity or doubt in respect to the exemption and discharge from the payment of the said county tax on the said road bed of the appellee, then there is no ground upon which the appellant can seek a construction contrary to or outside of the express language thereof.

In the construction of statutes it is a rule of general application that effect must be given to the words used by the Legislature, if there is no uncertainty or ambiguity in their meaning. It is true that exemptions to individuals, from the common burdens laid upon citizens by the necessities of government, are not favored by the courts and are generally strictly construed, and that the courts have therefore required an exemption from taxation to be, beyond any reasonable doubt, within the intention of the Legislature, or they have declined to enforce it. And this intention must be manifested by the Legislature in plain and explicit language, concerning which there can be no misunderstanding.

These stringent requirements are more especially applicable to cases in which exemptions from taxation, or the surrender of the taxing power, are embodied in the charters of private corporations. The present is not a case of a surrender of the taxing power, nor strictly of an exemption from taxation, but rather of a release from

taxation in consideration of a specified sum paid in lieu thereof from year to year until the Legislature shall otherwise direct; so that the special reason for the foregoing stringent rule does not exist in the present case; and yet, in its clear, explicit, indubitable language and meaning, this Act so completely conforms to the most exacting requirements of the rule that it absolutely precludes the appellant from seeking a construction of its terms or the intention of the Legislature outside of the language of the Act itself.

The objection that the operation of the Act, under the foregoing construction of it, will bring embarrassment and inconvenience to the county officials in their administration of the county tax laws, and deprive the county of a source of revenue and thus increase the burdens upon other property owners, cannot avail against the clear intent and express letter of the law. This result is within the discretion and power of the Legislature; 18 Wall., 225 [85 U. S. bk. 21, L. ed. 894]; if intentional, and if unforeseen, as is often the case, or unintentional, it may be remedied by legislative, but not by judicial, intervention.

The cases in 17 Grattan, 181; 32 Iowa, 429; 91 N. Y., 584, and in other reports, cited by the appellant to show that the words "all taxes under any and all laws of this State" might be construed and restricted to mean only State and not county taxation, are not applicable as controlling precedents in the present case. In none of them was the language so comprehensive, explicit and indubitable as that used in this Act. In all of them there were peculiar features, and especial reasons for the conclusions therein reached, not existing in the present instance; and in some of them there was found (as is not so in this case) internal evidence in the Acts in controversy, indicating a legislative intent not to include the tax, the exemption from which was in question; while in most, if not all, of them, exemption from municipal taxation only was involved, which question is not now before this court for adjudication.

The claim of the appellant that the "Joint Resolution relating to certain taxes" adopted at Dover, April 19, 1883, 17 Del. Laws, 562, is "*in pari materia*" with the said Act of 1873, and therefore "operates as a legislative authority and command fixing and determining the status of the appellee as to the extent of its exemption

with respect to taxes levied after the adoption of that resolution," is unfounded in fact.

The resolution itself affords internal evidence that it does not affect the taxation or exemption of the appellee; but, on the contrary, only of other companies. Again; the resolution refers exclusively to such companies as were in arrears for taxes due the State at the time of its adoption; while it appears by the record in this case that the appellee was not in arrears therefor at that time.

It may be true that the Act of 1873 exempted the appellee from the payment of both county and State taxes, upon the payment of the specified commutation as prescribed therein, while the said Resolution, and other commutation Acts, may exempt all other companies only from State taxation. But since the legislative power to create this discrimination and inequality is indisputable, it affords no valid objection to the Act of 1873, if its terms and meaning clearly and unmistakably manifest a legislative intent to exempt or discharge the appellee from the payment of both county and State taxes, as it has been shown they do, beyond any reasonable doubt. *People v. Davenport*, 91 N. Y., 589.

It cannot be conceded that the construction which is given to this Act necessarily leads to an absurdity, or manifest injustice. It is possible to conceive of many reasons which would be sufficient to induce the Legislature, in consideration of a certain adequate sum paid into the State treasury annually, to release and discharge the appellee from the payment of all taxes, both county and State, from year to year, until otherwise directed by the Legislature, even though in doing so it discriminated against other companies. It is not necessary to enumerate these reasons, or any of them. That in the legislative judgment, this course has been adopted as a wise and beneficial policy for the State, and that such legislative purpose has been "manifested in plain and explicit language concerning which there can be no misunderstanding," is enough. That it has been so manifested in the Act now in question seems incontrovertible.

The conclusion, therefore, follows that the decree of the Chancellor, in so far as it perpetually restrains and enjoins the collection by the appellant of the said sum of $271.41, rated and apportioned

upon the valuation of the road bed or right of way of the appellee for the purposes of county taxation, should be affirmed.

If this interpretation of the Act of 1873 shall result in hardship or inconvenience to any, or in confusion or other embarrassment in the administration of the laws enacted for the purposes of county taxation, relief may be had by immediate application to the General Assembly now in session, the Legislature of 1873 having wisely and expressly reserved the power to modify or repeal the provisions of said Act at any time.

COMEGYS, C. J., dissented.

SUPERIOR COURT,

SPRING SESSIONS,

1887.

JAMES TRIMBLE and JOHN E. STEVENSON, trading as JAMES TRIMBLE & CO. *v.* MARY A. VANDEGRIFT.

Bank Stock—Attachment—Sheriff ordered to Sell.

Where certain bank stock had been attached upon *fi. fa.* attachment in the hands of the sheriff, the Court ordered the same, or a sufficient portion thereof to be sold in satisfaction of said writ, notwithstanding the cashier of said bank had been notified that said stock had been sold, but it not appearing to whom it had been sold and no transfer of the same having been made on the books of the bank.

(*New Castle, February 7, 1887.*)

APPLICATION for an order of court authorizing the sheriff to sell certain shares of bank stock previously levied upon on an execution attachment.

This was an attachment *fi. fa.* issued on a judgment obtained by plaintiff at the November Term, 1886, and under which certain shares of bank stock in the People's National Bank at Middletown, were attached.

The sheriff's return was in due form, and accompanied with the following certificate of the cashier of the bank.

"MIDDLETON, DEL., Dec. 17, 1886.

"Giles Lambson, Esq., Sheriff of New Castle Co.,
State of Delaware.

"DEAR SIR:

"I hereby certify that Mrs. Mary A. Vandegrift has nine

"shares of stock of the People's National Bank of Middletown, "Delaware, standing in her name on our books, of which we had "notice previous to your attachment for Jas. Trimble & Co., that it "had been sold."

Very truly,
G. D. KELLEY, Cashier."

Alexander B. Cooper for plaintiffs moved the Court for an order of sale, to sell said stock or as much thereof as might be sufficient to satisfy their judgment. Rev. Code, p. 378, Sec. 13.

The return states that the bank had notice of a sale of the stock prior to the attachment, but it does not say how, or from whom it received such notice, or to whom such sale was made.

Besides we claim that there was no such sale. It was not completed upon the transfer books of the bank. The cashier says they still stand in her name.

Even if there was an attempted sale or transfer of this stock, we claim it was fraudulent, and this is our only mode of testing it, as our claim is alone under the attachment. Any question as to the fact of an assignment, or its validity must arise hereafter.

After consideration, the COURT granted an order as follows:

And now to wit this seventh day of February, A. D., 1887, on motion of the plaintiff's attorney, for an order to sell the shares of bank stock attached by virtue of the above writ, or as many of said shares as shall be sufficient to satisfy the debt, interest and costs in said writ, it is ordered by the Court that the said shares or so many of said shares as shall be sufficient to satify the debt, interest and costs aforesaid, be sold at public vendue, to the highest bidder, upon such notice as is required for sales upon execution process.

FERRIS GILES *v.* THE DIAMOND STATE IRON COMPANY.

Master and Servant—Duties—Damages.

The jury must render their verdict according to the law and the evidence in the case.

The master must provide the servant with safe and proper implements with which to work and a safe place in which to work, and must keep him, while at work, from exposure to danger from any cause or source within the control of the master, and not incident to the employment or trade of the servant. A violation of these duties will entitle the servant to an action for damages against his master.

When a servant voluntarily undertakes a perilous service for his master, and the peril is as well known to the former as the latter, or by the exercise of prudent care on the part of the former (and which it was his duty to take) he might become acquainted with it, he will have no right to an action against his master if he be injured while in the performance of such service.

If the injury is caused by a distinct part of the general work done by other servants, the duty of prudent caution, or circumspection, did not rest with the same weight upon the injured servant as if occasioned by defective work or material within his own particular line of labor, unless the danger was so obvious as to fasten the servant with knowledge of it.

The plaintiff being employed as a carpenter to work upon the roof a building which was being erected by defendant, the walls being completed and part of the roof being on before the beginning of such service, was not bound to inspect the walls of the building to ascertain its safety before going upon the roof; and he is entitled to damages sustained by the falling of said walls, while he was thus engaged.

It having been suggested to defendant that the walls of the building were inadequate in thickness and not in accordance with the requirements of the ordinances of the city in regard to the thickness of walls of buildings, he became liable to any damage sustained by the workman on account of such defect.

If the building would have resisted any usual storm in the latitude, the same as other buildings of large proportions and well built, and if the storm that overthrew it was extraordinary, and such as builders do not provide against or contemplate in planning their architecture, then the defendant is not liable.

If the verdict be for the plaintiff, he is entitled to damages for the expenses incurred in being treated and attended; for his bodily pain and suffering; for hindrance from pursuing his employment, and loss of wages from his disability by reason of its permanency.

In such a case exemplary damages should not be awarded.

(*New Castle, February 19, 1887.*)

ACTION ON THE CASE for personal injuries received by plaintiff while in the employ of defendant.

Levi C. Bird for plaintiff cited: notices citation on other side from 2 Thomp. on Negl., 994; 4 Ore., 52, 56. Secondly, that the defendant and plaintiff had equal knowledge or means of

knowledge of the defects or deficiencies in the wall. This was not the case, nor had they the same means of knowledge. What is a patent, and what is a latent defect? It was an unlawful building, contrary to the city ordinance which required such a wall to be seventeen inches thick. [Reads the ordinance.] N. E. Rep., vol. 5, 187; 116 N. S., 652; N. E. Rep., vol. 2, 24; 99 N. Y. Co. Appeals., 368; 26 Am. & Eng., R. R. Cases., 325; At. Reps., vol. 3, 38; N. E. Rep., vol, 7, 877; At. Rep., vol. 6, 437; N. E. Rep., vol., 5, 449; *Wood's Law of Master and Servant*, Sec. 384–5–8; *Whart. on Neg.*, Sec. 217; 76 Pa., 389; 49 N. Y., 521; 106 Mass., 282; 2 Thomp. on Neg., 972, 974, 975; 24 N. Y., 410; N. E. R., vol. 9, 302.

George Gray, on the same side: *Whart. on Neg.*, 232; 30 Md., 204; 2 Ell. & Black, 76; 4 Wall., 678; 6 Hurls. & Norm., 488; 4 Hun., 318; 3 Hurls. & Fult., 596; L. R., 5th Queen's Bench, 411; 57 N. Y., 567; *Smith on Neg.*, 419. These authorities all go to the negligence of the defendant in the action. *Whart on Neg.*, Secs., 205, 214; 100 U. S., 214, 216, 218, 222; 7 Hurlst. Norm., 937; *Whart on Neg.*, Sec. 210, note; 45 Ill., 197; 52 Ib., 183; 44 Md., 283; 46 Mo., 163; 2 Hurls. & Norm., 213; Whether the plaintiff was guilty of contributory negligence is a question for the jury, 49 N. Y., 521; *Woods, &c.*, Sec. 388.

Edward G. Bradford for defendant cited: The law of master and servant and the law of negligence, either may be involved: 1. Thinness of the wall. 2. One end was left open below the square. The defects or deficiencies in the wall complained of were not latent, but patent to every workman on the roof, having knowledge of them the plaintiff accepted the employment subject to and assumed the risk of it. 1 Houst., 469; *Flinn's Case*, 3 Houst., 176; 4 Houst., 103; 4 Houst., 626; 4 Houst., 583; 3 W. & W., 1; 5 E. L. & Eq. Rep., 265; 9 Ex. Rep., 223; 40 E. L. & Eq. Reps., 491; 2 H. & N., 768; 3 H. & N., 648; 11 Exch., 832; 102 E. C. L. Rep., 385; 12 Q. Bench Div., 493; 77 Ill., 256; 110 Ill., 340; 5 Bissell, 315; 2 *Thompson on Neg.*, 994; *Wood on Master and Servant*, Secs. 335, 382; 4 *Waite on Actions and Defences*, 418; 29 Conn., 548, 560; 25 N. Y., 562, 566; 63 N.

Y., 449; 11 N. W. Rep., 559; 4 Ore., 52, 56; 40 Iowa, 341; 27 Min., 137, 140; 31 Cal., 376; 46 Cal., 409; 13 Barb., 9; on non-suit.

George H. Bates, for defendant: *Beach on Contr. Neg.*, Sec. 123; *Whart. on Neg.*, Sec. 237, 243, 214, *n. 1*; *1 Thomp. on Neg.*, 368, 376; *Whart. on Neg.*, Sec. 420, 421; 3 W. Rep., 393; 5 N. E. Rep., 187; *Woods, &c.*, 382.

Charles B. Lore, on same side:

Prayers for Instructions on behalf of the defendant.

1. That upon the evidence the jury must find a verdict for the defendant,—

or, if the first instruction be refused, then as follows:

2. That if the jury from the evidence believe that the defendant in and about the planning and erection of the building in question exercised the same care that should have been used by an ordinarily prudent man with respect to the planning and erection of such a building, then the plaintiff cannot recover.

3. That if the jury, from the evidence, believe that the building in question was defective by reason of the thinness of the brick wall and the fact that the southerly end of the building was left open below the square, or in either of these respects, such defects were patent, and the plaintiff being bound to know them, assumed whatever risk was connected therewith, and cannot recover.

4. That upon the evidence the plaintiff was bound to know the thickness of the brick wall of the building in question and the fact that the southerly end of the building was left open below the square, and that if the jury, from the evidence, believe that the defendant had not, during the planning or erection of the building, any notice or idea that the building was or would be dangerous, the plaintiff must be considered as having assumed whatever risk was connected with the thinness of the wall or the fact that the end of the building was left open, and cannot recover.

5. That if the jury, from the evidence, believe that the plaintiff had equal knowledge or means of knowledge with the defendant as to the risk or danger of the falling of the building in question, the plaintiff cannot recover.

6. That when the plaintiff went to work upon the defendant's premises in the capacity of a carpenter, the defendant had the right to rely upon the plaintiff's competency to perform the duties of his employment and upon his ability to apprehend and avoid all dangers that he might have discovered by the exercise of ordinary care and prudence.

7. That the defendant was not bound in and about the planning and erection of the building in question to provide against storms of unusual violence, but was only bound to exercise that degree of care due from ordinarily careful and prudent men in and about the planning and erection of such a building.

8. That if the jury from the evidence believe that the building in question would not have fallen at the time it did fall, but for wind pressure upon the building, and shall further believe that the building would have fallen under that wind pressure even if the brick wall between the piers had been thirteen (13) inches in thickness, plumb and properly constructed, then the plaintiff cannot recover.

9. That if the jury from the evidence believe that the building in question was improperly planned or constructed and fell by reason of pressure, but that even if properly planned and constructed it would have fallen by reason of that wind pressure, then the plaintiff cannot recover.

10. That in this action the burden of proof is upon the plaintiff to establish negligence on the part of the defendant.

11. That in this action the burden of proof is upon the plaintiff to show due care on his own part.

COMEGYS, C. J. charging, the jury:

Gentlemen of the Jury:

You need not be told by me that this is a very important case. Great interest has been manifested by the public in respect to it; it has excited a great deal of attention in the community, and the attendance of the members of the bar here to watch it tends to show the deep interest they take in it also. It is very fortunate that it is committed to a jury so intelligent and well known in the community and so worthy in every way as I know you are.

This is a case, the features of which are peculiar, but after all there is nothing very strange about the law which is applicable to it. The law of negligence has come under review in this Court on several occasions and the Court has uniformly laid it down to the jury as I shall lay it down to you to-day, except so far as I shall be obliged to deviate somewhat on account of the peculiar characteristics of this case and I need not say to you that it is a case in which the jury must be governed by the law and facts in making up their verdict. The law is part of the testimony in the case: it comes from the mouths of the judges, who are sworn to do their duty, and their duty is to deliver the law as they believe the law to be; and therefore there is the same sanction precisely with respect to the deliverance by the Court that there is to that of a witness at the bar of the Court. While your judgments may not approve the law, you are still bound by it; otherwise, there would be no certainty in judicial trials. And you are to be governed by what is said by the witnesses, but you are not bound to believe all that the witnesses say, and you may choose between them which you think are most worthy of credit; but in a case of this kind you are bound to give your verdict to that side upon which, in your judgment, there is the greatest weight of testimony. It is not the *number* of witnesses that prove a fact so that the jury should always be governed by it. Of course, they exercise an influence; but it is the *quality* of the testimony—the matter of *knowing* what they speak of, their manner and demeanor on the stand, and the probability of their testimony being true; and you must give your verdict to that side upon which the greatest weight of testimony is—wherever the *preponderance* of evidence is, there should your verdict be. In other words, you are to render a just

and true verdict according to the evidence in the case: and I am perfectly sure that none of you will be influenced by any consideration of the fact that the defendant in this case is a corporate body and that the plaintiff in this case is a young man without means. You must try it between them as individuals and not allow any feeling of prejudice to exist. I know you will not be influenced by the fact that the defendant is a corporation. It is entitled to the same degree of consideration in this Court as an individual man, and having no greater privileges or rights. If a corporate body has done wrong, it must be held liable for it. If this young man has just grounds of action, you must give him what, in your judgment, is just compensation. But I will say to you now that this is not a case for what is called *vindictive* damages; that is, damages to punish the defendant. There *are* cases where the jury *ought* to give a verdict to *punish* the defendant, where the defendant has been guilty of wilful and gross negligence—paying no sort of regard to the interest of others—because that is something very different from negligence from the simple want of diligence which all business men should observe.

When a man in any business is guilty of gross negligence which endangers the lives of others, he should be punished by being made to pay. I do not think that this is a case of that kind, and therefore, you must base your verdict upon what you think the plaintiff ought to have, if you give him anything at all. I will now proceed:

The defendant in the year of 1885 and before that period was engaged in the business of manufacturing iron in the city of Wilmington, and still pursues the same employment. Its exigencies required that it should erect a new building in addition to those already owned by it; and the witnesses Simpson and Foulk were severally employed by its agents for that purpose. The building was to be partly of brick and the rest of wood, and Simpson was to do the brick work. The witness, William H. Foulk, was employed in like manner to do the wood work. By the contract with Simpson, he was to supply the bricks, lime and mortar for the wall, and and the labor to build it; but this, at the request of the defendant, through its aforesaid agents, was so modified as that the defendant

should furnish the bricks and sand. The building was to be a very large one, viz., 250 feet long, 56 or 57 feet wide and 21 feet high to the square; one side was to be a brick wall 21 feet high from the foundation, and 9 inches (or one brick) thick; with pilasters 16 feet apart from centre to centre, 17 inches (or two bricks) in thickness, and about 26 or 27 inches wide. The wall was, accordingly, built of those dimensions. The other side of the building and one of its ends were built of wood, but the other end was left open from the ground at the instance and by the orders of the defendant through its agents (there was no other floor) to the square of the building. This opening was, of course, about 56 feet wide, by 21 feet high. The 9-inch wall was pierced in the middle of the space between each of the pilasters with an opening for a window, about 4½ feet wide by 7 or 8 feet high, in which window frames were secured. The whole structure was covered by what was called by the witnesses a truss roof, self-supporting and framed, as shown by the plans exhibited. Upon the brick wall was a wooden plate 3 inches thick and 13 wide, and properly secured, where the pieces of it were joined to make it continuous. There were girders resting upon this plate, over each of the pilasters; they were well secured to the wall through the plate, according to the testimony. There was nothing resting upon the 9-inch wall but the plate described. All the actual weight therefore, of the truss frame with its covering of inch boards and longitudinal ventilator of 250 feet, and slating to be done upon the whole, was to be borne by the pilasters, with the lateral support the 9-inch walls between them would give to them. At the time the plans for the building (which were made by one of the defendant's agents) with the specifications, were submitted to and seen by the witness Simpson. He tells you that he suggested to the president of the Company, Mr. Mendinhall, when they had the plans before them and were discussing about the building, that the 9-inch wall looked thin and should be 13 inches—a brick and a-half thicker—giving to him as his reason, as he tells you, that the wall would be *stiffened up* by it. The president, he says, argued to the contrary, and he gave the matter up; but in his second examination in behalf of the plaintiff, he said he was of the same opinion now as he expressed then. If the

witness' suggestion had been adopted, the walls would have been within 4 inches of being as thick as the pilasters. This opinion was given before the work was undertaken; and the plan did not contemplate an open end as described; for, according to the testimony of the witness Foulk, it was during the progress of the work that the order was given him to leave a certain end open. Therefore the expression from Simpson in his conversation with the president was in contemplation of the building being enclosed on all sides, and fastened—the wood work to the brick work, as is usual in connecting houses, the walls of which are some one or more of them, of masonry, and the rest of wood work. The masonry is proved to have been well done and the materials good, as was doubtless in the witness' mind (for he was to build the wall) at the time he made his suggestion to Mr. Mendinhall.

The building not being entirely finished on the 28th of July 1885, the plaintiff went to work upon it, he having been employed for that purpose, as a carpenter, and worked upon the roof that day. The next day, the 29th, he was also at work there, and about the ventilator. While thus employed, according to his testimony, he suddenly became aware of a movement of the roof, which he described, and then the whole structure fell, burying him in the ruins and breaking his left thigh bone and doing him, according to his account, other serious injuries, from the latter of which he says he has never entirely recovered, and by reason of which he states he is unable to work and labor at his calling as before that time he could do. Conceiving and being advised by his counsel that his injuries were not caused by any act, or default of his own, but were occasioned by the inadequate and insufficient brick wall described erected by the defendant through its servant, the witness Simpson, who acted entirely under its orders, he caused this suit to be brought alleging the aforesaid injuries and that they arose from the act of the defendant in building such a wall as that described, and claiming damages according to his ideas of the extent of the calamity which befell him. The defendant resists this suit entirely, contending in the first place that there was no fault on its part in erecting the said wall of the dimensions given; but if there was that the defect in it: as well as the open end of the structure, was as visible and evident to the defendant as to it; and that where such is the

case, that is where danger exists as connected with a service to be rendered by one employed, which danger is entirely open to his observation before he undertakes his service, if injury befell him, he cannot resort to the master for compensation unless he have a contract guaranteeing safety—he taking the risk of the employment in consideration of the wages given.

The plaintiff's service as a carpenter upon the building (he was engaged in that capacity) began on the 28th of July, 1885, when the work upon the whole had been done except covering the truss frame with a sheathing of boards for the slating. This was nearly done the next day, the plaintiff working as before mentioned, when at about 2 o'clock in the afternoon, as the plaintiff states, the occurrence took place. The building was being erected on land of the defendant over the creek and within this city. The plans and specifications for it were made by the defendant's agent Jones.

The facts given you are not in controversy; but as out of some of them arose this action, it becomes important that you should keep them in mind while I am putting before you the law applicable to them as understood by the court. This law must be your guide in reaching a conclusion or rather in making up your verdict.

The plaintiff and defendant from the time of the employment of him by it, bore, in law, the relation of master and servant—the corporation defendant being the master and the plaintiff the servant. Whenever that relation, or status exists, the law attaches to it certain correlative duties, or obligations on the part of the master to the servant and the servant to the master. And there are also certain implied undertakings between them. Of the latter is that on the part of the master that he will treat his servant well and pay him his just wages, if none have been especially agreed upon; and, on the part of the servant, that he is reasonably qualified to perform the service he undertakes. Of the duties which attach to the relation, there is, on the part of the master, that of providing the servant with safe and proper implements and tools to work with (in cases where the master supplies these) and a place of safety to work in, or upon, and of keeping him from exposure to danger while at work, from any causes or sources within the control of the master, and not incident to the employment or trade of the servant.

The correlative duty of the servant is to faithfully perform the requirements of his service to his master which he has undertaken, and in so doing, to obey and observe all orders of a legal, proper and suitable nature, with respect to his service. These exist without any special contract between the parties; for they are legal duties imposed by the system of law by which our rights are recognized and secured to us.

It follows, from this statement, brief but I hope sufficiently plain to be easily understood, that when on either side any of these duties are disregarded, or not performed, and the party entitled to their observance or performance suffers injury thereby, he is entitled to an action in a court of law to recover such sum of money, by way of damages, as he can prove to a court and jury that he is entitled to by reason of such default. The plaintiff has shown to you by the testimony of himself and his witnesses what the injury to him was, in consequence of the falling of the building of the defendant, and asks damages to the amount of $20,000 at your hands: the defendant denies that he is entitled to any, insisting that it was the duty of the plaintiff to take notice of the structure he was to work upon before he ascended to its roof; and, though denying that the defendant had any reason to believe that the brick wall was unsafe, it is claimed and insisted upon that any want of safety that attached to it, was as open to observation by the plaintiff as by the defendant. It is certainly true, as a general proposition—that when one voluntarily undertakes a perilous service at the instance of another—as a servant for a master—and the peril is either as well known to the former as the latter, or by the exercise of prudent care on the part of the former (and which it was his duty to take) he might become acquainted with it, he will have no right to an action against his master if he be injured while in the performance of such service. Why? Because he is held to have undertaken the risk of the peril attendant upon the service, and was paid for taking it. A man offers himself, for illustration, to a farmer as a competent person to feed a wheat machine (a dangerous service), and is employed for that purpose. If he be injured in this service, he cannot recover from his employer, unless he can show that there was defect in the machine known to the latter, and which was not disclosed to him, or which was not such a one as was obvious to a

person acquainted with the service—and that the injury was caused by such defect. This rule for a case of that sort will apply to all employments where the service is of such a nature as necessarily requires at the hands of a servant that he should make a previous examination before he undertakes that service, unless the master has undertaken specially that he will guarantee him against all danger from it. The servant's duty, to the extent to which it goes, is in that respect of equal obligation with that of the master. Such a rule, however, may be extended too far; and, in our opinion, will be extended too far, whenever there is required the same degree of circumspection on the part of a servant entering a service a part of the duties of which with respect to their nature and quality are not at all within the scope of his undertaking, as there would be where the danger encountered is that ordinarily incident to his special employment. Such danger, in this sense, is not that resulting from the negligence or insufficient performance of duty by another, unless his attention is either called to it particularly, or it is so obvious as to compel him to notice it. Why is this? Because of the duty on the part of the master of which I have before spoken. If the injury is caused (as in this case the plaintiff claims it to have been from the falling of the entire structure from the alleged insufficient brick wall) by a distinct part of the general work done by other servants, the duty of prudent caution, or circumspection, did not rest with the same weight upon the injured servant as it would have done, if his injury had been occasioned by defective work or material within his own particular line of labor. Against the former he has the master's duty, before spoken of, to protect him—from which the master cannot be relieved by claiming that knowledge of the danger from such other work was as open to the servant as to him, unless it was so obvious as to fasten the servant with knowledge of it. In this case the brick wall was, by the accident that befel the building, shown, according to the plaintiff's proof, if you believe it, to be unfit for the service cast upon it; but no one called the attention of the servant to the fault of it in that respect; and his particular employment of carpenter, does not appear to us to have required of him that he should notice the wall to see whether it was capable of sustaining him safely while he was at work upon it, especially as most of the service upon the roof in his

line had so far progressed, that but little was necessary to be done to complete the carpenter's work entirely upon the roof. In the view we take of this case, he was, under the facts and circumstances proved on both sides, no more bound to inspect the wall of that building before he went upon the roof to ascertain the safety of relying upon it, than would an engineer about to take service with a railroad company be bound before doing so, in order to secure to himself a right of action against the company in case of injury by the breaking of a decayed bridge or culvert to first go along the line and inspect the road over which he was to drive his engine. Such caution, circumspection, or diligence, would not be required of him; why then of a carpenter who is employed to go upon a roof frame to sheath it, that he should previously inspect the walls of the building to determine their fitness to support the roof and him and other workmen? Can any satisfactory reason be given? In this case it would seem to be especially hard, in view of the undisputed proof that the defendant contended before the wall was built that it would be adequate to support or carry the roof, and has introduced in its defence witnesses to prove its sufficiency. There is of course great conflict of testimony upon this point; but that very difference among witnesses, claimed, on each side, to be competent experts, shows how improper it would be to hold an inexpert in regard to walls as the plaintiff was, to the rule that he took the risk of the wall when he engaged in the service of the defendant. That however, is a matter for you.

The contention of the defendant, as has before been said is, that the wall was sufficient to carry the weight imposed upon it; and in this he has the support of witnesses called on his behalf. But it must not be lost sight of, when you come to deliberate upon this case, that the witness Simpson tells you he spoke to the president of the defendant company—Mr. Mendinhall—at the time they were discussing the plans, suggesting that the wall was thin and that another four inches added to it between the pilasters would make it look better and stiffen it up. What the witness meant by such language and whether the president understood it as so meant is for you to decide; but he further tells you that Mr. Mendinhall proceeded to argue the subject with him, and that he then let the matter drop, or words to that effect. Mr. Enos another

witness, also tells you that he too spoke of the thinness of the wall before the work on it began, or at or about that time, to other agents of the defendant. Thus the defendant, if you interpret the language of those witnesses as so meaning, was apprised beforehand by competent judges that the wall would be inadequate. Again, the then building inspector of the city—the witness Philemma Chandler—was at the site of the new building after the work of laying the wall had been begun and before it had progressed very far, and expressed himself to the contractor Simpson and Mr. Davis to the effect that if there was to be any lateral pressure on the wall it would not do and that he would have pulled it down if it had not gone too far. In addition to this there is in proof before you the building regulations of the city of Wilmington in relation to the size, etc., for outside walls for rooms with truss roofs such as this building had—the seventh of which, in two of its consecutive sentences, reads as follows: "The outside walls of buildings having truss roofs, such as churches, public halls, theatres, restaurants and the like, if more than 16 or less than 75 feet high, shall average at least 17 inches in thickness; if over 25 feet in width and less than 40 feet in hight, the walls shall be 21 inches thick; if over 40 feet in height, then the same to be 26 inches thick; the stone walls for the foundations, or cellar walls, must be at least four inches thicker than the brick wall of the first story. Any building constructed, altered or erected to a greater height than the specifications in this section, or for other purposes, the increased thickness of the wall, if necessary, shall be determined by the building inspector."

Undoubtedly the city had very good reasons for enacting such regulations, the chief object of which, at least must be taken to have been, security of the lives of those having occasion to resort to or frequent them. The term having trussed roofs applied to the outside walls of such structures includes as well factories, or other buildings, where the calling of people is exercised from day to day, as the buildings mentioned, which we think were designated simply for illustration; and also that it applies as well to such a building with one brick wall as one with four of such; otherwise the regulation would not accomplish what we conceive to have been its obvious intent. The defendant, therefore, had the opinion of his

builder that the wall should be thicker to stiffen it up—like information in effect from the actual workman, Enos—the declaration of the building inspector before the walls had advanced far towards completion—and additionally the city building regulations—enough in the contention of the plaintiff, to have warned the defendant that the wall about to be built would be dangerous, although nobody used that particular term in regard to it. Whether it was enough, or not, is for you to decide and we abstain from expressing any opinion about it, except to say that the erection of the wall contrary to the ordinance is of itself presumptive evidence of negligence. If you think there was enough information to apprise the defendant of the probable danger of the building from falling from lateral pressure (which the wind undoubtedly made) then the duty of diligence and care I have before spoken of as obtaining on the part of the master toward his servant, was not performed in this case, and the consequences thereof resulting to the plaintiff, supposing him to have been guilty of no neglect of actual requirement of care on his part, must fall upon the defendant. Of that requirement I have spoken before and it is not necessary to repeat what I then said. The defendant seems to have relied upon the opinion of its own official servants as to the sufficiency of the wall in question to support the roof that was erected upon it—not calling in the judgment of engineers or architects, whose special business it is to design buildings, fix the thickness of their walls, the support necessary for the maintenance of them in their proper position, and do all other necessary things in the line of their profession for the guidance of the builders in the erection of buildings. It is true the defendant was not without assistance in that respect, for witnesses were produced who consulted with the president about the plan he proposed. But they were the official servants I have spoken of, who have testified to the sufficiency of the wall that fell, for the purpose it was to serve. But none of them, as I remember, ever followed the profession of an architect exclusively, or for any considerable length of time; and by the testimony of such professional architects as were examined for the plaintiff and who live in this city they are unknown to the profession as such. Still, it is not by any means conclusive evidence that they had not the requisite qualifications as architects—it being for you to decide

whether in a work of peculiar construction as the building that fell is proved to have been, the defendant ought not to have secured the skill and training of an architect devoted to that profession, rather than trust it to its own officers or servants, engaged chiefly in other engagements in its service. The defendant did not secure such extraneous aid, but chose to rely upon its own resources in this respect. If you believe the serious and to some extent fatal consequences resulting from the falling of the building were attributable to the inherent defect in the wall from its thinness, then the defendant must answer for such consequences by your verdict. But no resort to any architect for advice would have protected the defendant in building an unsafe wall.

The plaintiff's action is founded upon the allegation that the building in question fell, in consequence of the mistake made by, and want of due care on the part of the defendant in erecting the brick wall on Heald street, part of the new rolling mill, of the dimensions which have been proved and admitted. The defendant denies that there was any error or want of due diligence in building such wall; and each has produced witnesses in great number to maintain the issue thus agreed upon between them. I have already given you the law in regard to the case and diligence required of the defendant in this case; and it is for you to say whether the defendant duly observed it. So I have already pointed out to you the general duty attaching to or incumbent upon servants in entering upon a service in itself a dangerous one, and, endeavored to make myself understood in giving it as the opinion of the court, that as the plaintiff in this case was a carpenter and employed as such by the defendant whose duty it was to make the pursuit of his employment safe, the risks strictly incident to it only excepted, he, the plaintiff, had the right to rely upon the due and faithful performance of its duty by the defendant, and was not bound to take the extraordinary care of inspecting the walls of the building in going upon the roof to work. And this is all the more reasonable, because the defendant itself had erected the wall and avouched its safety by putting its servants to work upon it. I gave an illustration to show how unreasonable such a requirement of extraordinary care by the plaintiff would seem to be. Still, we do not ourselves undertake to pass upon that question, but leave it to you to

decide, along with the question of the defendants' negligence or want of due care, under all the circumstances, in erecting the wall as was done.

Should you decide, in view of all the testimony on both sides, that the wall was sufficient, not only to support the bare weight of the roof, but to *carry it* to use an appropriate expression by the architect, Theophilus P. Chandler, in the usual exigencies of storms of rain and wind that assail buildings, then the defendant should be given your verdict; but if you find, on the contrary, that it was not adequate to that service, or requirement, then your verdict should be for the plaintiff. But the defendant insists, that the storm that occurred at 2 o'clock in the afternoon of July 29th, 1885, was an extraordinary one, against which the prudent caution which it claims was exercised, in the erection of the wall, to insure safety, and which it alleges was adequate and all the law required, could not avail; and that the building gave way under its violence; that it was of a phenomenal character defying the ordinarily sufficient precaution against casualties from the weather. The plaintiff, on the other hand, claims that the storm was not an unusual one at all, but the common thunder storm of the summer; and that no building adequately constructed would have gone down before it. Both sides fortify their contentions with testimony of witnesses of the value and weight of which you are the sole judges. The plaintiff supplemented the testimony of his witnesses, as to their personal observation and experience, with the fact, testified to by the reporter of one of the daily papers of this city whose business it is to gather news of an interesting character for his paper, that no information came to him of injury to any other building in the city from that storm. If you should find that the building would have resisted any usual storm in this latitude the same as other similar buildings, of large proportion and well built, do: but that the storm that overthrew it was extraordinary, such as builders do not provide against, or contemplate, in planning their architecture, then the defendant is entitled to your verdict. But the plaintiff is entitled to it unless the defendant shows this to your satisfaction. *Prima facie* when a building falls, it is from negligent or insufficient construction; it lies upon a defendant, who is such on that account, to prove that causes over which he had no

control, and for which he is not responsible, brought about the result. It is a most unusual thing for a house to fall to the ground, and he who by no fault of his suffers injury by it has the right to call upon the owner for compensation for such injury. If he resists the action he must show that he was in no default whatever.

I have a few words to say in regard to damages. There was no estimate or any paper handed to the Court regarding what the damages to be claimed were, except something was said about what we call vindictive or exemplary damages.

The damages to which we feel that the plaintiff is entitled, if you think he is entitled to any, are for the expenses incurred by him in being treated and attended in endeavoring to be cured; for his bodily pain and suffering. Nobody can estimate that exactly in money. It is a question that must be passed upon by the jury: hindrance from pursuing his employment as a carpenter and transacting his other business, and loss of wages from his disability and by reason of its permanency, if it be so. He has stated to you the wages he was earning, the loss of which, it seems to us, you must take into consideration. As to the expenses incurred so far as his being cured, etc., are concerned, and what he suffered from any injuries that might exist at that time, or that continued to exist long after, from these pains in the back, and his hindrance, through being disabled, from earning his living as before he was accustomed to do. These are the things you must decide. He was a carpenter by trade and a cabinet maker by trade, and these trades require that a man shall stand: He cannot sit down. You must do the best you can, but give, on no account, exemplary damages—damages to make the defendant an example of or to punish it. It is not a case of gross negligence in any way on the part of the defendant. If you think it a case of negligence, it is a case of the lack of the sort of diligence which careful and prudent men ought to have observed; and we have given to you examples in which a prudent man should act in undertaking to erect a building of this kind. I now leave this case to you.

I think the charge we have delivered to the jury will cover all that has been said on the other side in their instructions; if not, if the counsel will tell me any points that have not been considered, I will take up their instructions one by one.

Mr. Bradford—As I understand the matter, all of the insructions have not been covered, as written upon the paper handed to you.

CHIEF JUSTICE—Then I will take the matter up. When the charge covers instructions, the Court are not bound to review the points which the charge covers.

The Chief Justice then read separately the instructions presented by the defendant's counsel and said: "We decline to give instructions on the point covered by the first, as we have already instructed you on that point when we said that a man ought to exercise due care in a case of that kind, and must take something beyond the ordinary care in putting up a building of that kind. We also decine to give instructions in the second, as we have likewise considered that point.

On the third we gave you the instance of an engineer; that he is not bound to go along the road and inspect it before running his engine upon it. The law holds no man responsible for not taking cognizance of such things in an employment and duty of that kind.

The fourth we decline to take cognizance of the first part for the reason that I have just given. And the next, because it presupposes that the defendant is excused from the duty of noticing what the building should be, whereas his duty required him to know whether it would be safe for those working on it.

The fifth instruction we decline to give because the president of the defendant, Mr. Mendinhall, was talked with and consulted about the plans and the plaintiff could not have had equal knowledge of the defects in the wall, and it is improper for us to give you instructions of that kind on any assumption that he had.

As to the sixth, there is no objection to the part that defendant had a right to rely upon the plaintiff's competency in his employment; but he had no right to be apprehensive and avoid the danger that he might have observed by the exercise of ordinary care and prudence, as stated in this instruction.

These are very carefully drawn instructions and somewhat difficult to answer.

On the seventh point I have already addressed you and told

you that unless the storm was a phenomenal one such as buildings do not provide against and do not contemplate, that one is liable if the building fall by reason of that storm.

The eighth is refused because it is assumed that 13 inches would be thick enough, whereas it is not proved. It is proved that the wall ought to be 17 inches thick.

The ninth is refused as allowing the jury to speculate concerning an uncertain fact, there being no proof of the fact.

Primarily the tenth instruction is all right, but having proved negligence the defendant was bound to due diligence.

As to the eleventh, in the prosecution of a case of this kind, if it was not plaintiff's negligence he is bound to show it. His whole case was tried upon that theory.

Verdict for the plaintiff.

JOHN A. BEEBER, Receiver of the Lycoming Fire Insurance Co., *v.* EPHRIAM T. WALTON, FRANCIS N. BUCK and CHAS. RICHARDSON, doing business as Walton, Whann & Co.

Foreign Insurance Company — Foreign Record — Evidence — Books of Plaintiff — Pleadings — Leave to Amend — Certificate of Insurance Commissioner.

A copy of the record from the recorder of deeds in a county in another State showing the change of name of plaintiff, said change having been made by the Court of Common Pleas of said County and ordered by said Court to be recorded in said recorder's office and this being the only record of said proceedings under the law of said State, being properly certified, is admissible in evidence.

Plaintiff's book in which the minutes of its proceedings are kept and also containing a copy of its by-laws which were adopted on the report of a committee of the directors, admitted in evidence, though objected to as not being the original report of said committee.

The certificate of the Insurance Commissioner showing the plaintiff's right to do business in this State was not admitted in evidence, there being no allegation or averment in the declaration that the corporation had lawful authority to do business in this State.

Leave to amend pleadings granted during the course of the trial.

The certificate of the Insurance Commissioner cannot legalize insurance transactions entered into prior to the date of said certificate, said transactions being contrary

to the provisions of the law prohibiting any such insurance unless previously authorized by the said certificate of the Insurance Commissioner properly obtained. The plaintiff cannot recover upon premium notes taken prior to the issuance of said certificate of the Insurance Commissioner authorizing the plaintiff to do business in this State.

(*Kent, April, 1887.*)

NARR IN ASSUMPSIT on premium note of defendants to the Company.

Pleas, 1, non-assumpsit; 2, payment; 3, release; 4, accord and satisfaction; 5, discount; 6, set off; 7, statute of limitation; 8, That prior to the making of the said assessments on the said premium note &c., &c., the defendants had duly surrendered to the said company their policy of insurance which was duly accepted by it, and thereupon the defendants ceased to be members of the said corporation plaintiff, &c; 9, That the said premium note was obtained and procured by the said company from the defendants by means of the fraud, misrepresentation and covin of the said company &c.; 10, That the defendants were induced to become, and did become members of the said corporation plaintiff, and to make and deliver the said premium note to the said plaintiff by means of the fraud, misrepresentation and covin of the said plaintiff, &c.

Fulton and *McCormic* and *Beeber* for plaintiff.

Neilds and *Hayes* and *Massey* and *Ridgley* for defendants.

Fulton offers the charter of the company in evidence.

Massey objects to the admissibility of it, because the printed pamphlet offered while it purports to contain copies of the Acts of Assembly in Pennsylvania concerning the corporation, which appear to be properly authenticated, but it also contains what purports to be a copy of certain judicial proceedings in the Court of Common Pleas of Lycoming County in that State to which this corporation was a party which is not authenticated correctly in conformity with the Act of Congress.

McCormic then offered in addition to the foregoing a copy of the record of the judicial proceeding mentioned, duly certified as such in conformity with the Act of Congress as he alleged.

Massey further objected that it appeared that the copy of the record just offered was made out and subscribed by the Recorder of Deeds of Lycoming County, Pa., and not by the Prothonotary or clerk of the said Court of Common Pleas of said county, which was therefore not in conformity with the Act of Congress, which requires that it should have been certified under the hand of the Prothonotary and under the seal of that court. It is only by the Act of Congress that this instrument as a copy merely of an original record or of any other instrument of writing can be produced in evidence here in this or in any other case, and the modes prescribed by it must be strictly followed. 95 U. S., 422; 5 Harr., 107.

McCormic. There is no other record of the proceeding had under the Act of Pa. in the Court of Common Pleas of Lycoming County to change the name of the corporation plaintiff, than that which has here been offered, and which is accordingly the sole original record of the proceeding for that purpose in that court, and which is under the law of that State directed by the court to be entered or recorded in the office of the Recorder of Deeds in that county. Rev. Code, Sec. 14, p. 762.

Nields. There is an affidavit filed in this case by the defendants denying the existence of this corporation.

THE COURT overruled the objection and admitted the certified copy of the proceeding offered by the change in the name of the corporation plaintiff. The counsel for the defendants excepted to the ruling, &c.

James M. Bowman testified: Was secretary of the corporation in June, 1872, to June, 1873, and this is the minute book of the company during that time, and is in the hand of the President of it, and was made by him on the 17th of June, 1872, and are minutes of a meeting of it held on that day. It is a copy of the by-laws of it adopted on the report of a committee of the directors on that day. Was secretary of it until 1881.

The minutes offered in evidence by counsel for the plaintiff. Objected to on the other side because the minutes were not the original report of the by-laws reported by the committee of the

directors on that day, and are not admissible without proof of the loss of the original.

THE COURT overruled the objection and admitted the evidence.

John R. McFee, Esq., sworn, after which the counsel for the plaintiff produced and offered in evidence the certificate of the Insurance Commissioner of this State that the corporation plaintiffs was duly and lawfully authorized to do and carry on business in this State.

Massey objected to the admissibility of it in evidence, because there is no allegation or averment in the declaration that the corporation had lawful authority to do business in this State, and as it is material to the right of action, not having been alleged, it cannot be proved. *Gould's Pl.*, 174, 175; 1 Ch. Pl., 320. Our statute requires that as corporation of another State it should have such a certificate as is offered in evidence to lawfully do business, and, of course, to make such a contract as this, in this State. 8 Wall., 181; 1 Ch. Pl., 322, 323, 236; 6 T. R., 710; 55 Vt., 522, 532. The other ground of objection is founded on the provisions contained in the act of this State, *Del. Laws*, Vol. 16, Sec. 5, 29; 3 Harr., 456.

McCormic. The general averment that the company was lawfully engaged in the insurance business was sufficient to admit the evidence, and if not, it should have been demurred to, and not traversed by the plea of the general issue; the averment had reference both to the time and the venue (this county) alleged in the declaration.

Nields. We could not have demurred to the declaration on that ground for the action on this contract was transitory, and *non constat* that it might have been, and was made between the parties to it in Pa.

Fulton. The case cited from 55 Vt., reports, I take occasion to say, after having made the most thorough search of my life, is the only one to be found to the same effect anywhere, but it

was on demurrer, and not on an objection to evidence on the trial of the case before the court and jury. He cited 53 Pa., 353; 8 Kans., 9; 18 Wis., 235; 13 Pet., 536; 1 Harr., 216.

THE COURT, after adverting to the averments in the narr and the statute referred to, sustained the objection and ruled out the evidence offered.

McCormic then asked leave of the court to now amend the declaration by inserting in it the necessary averments.

Massey objected and read the 14th section of the statute of amendments, and contended it was the only provision in the statute under which the application to amend the declaration can be granted during the trial of the case before the jury. He next referred to the provisions of the 11th section of the same statute. 4 Houst., 100; 5 Harr., 381; 4 Harr., 204; 3 Ibd., 75; 4 Houst., 548.

Ridgley, on the same side.

Fulton. The statute of amendments are to be liberally construed. Refers to and reads the provisions of the State Constitution on the subject, and insists that in accordance with the language and spirit of it, the Court ought to allow the amendment now asked for.

McCormic, 2 *Black. Com.* 407. Reads the 11th Sec. of Statute of Amendments, and contends that the language of it is so broad and comprehensive and general that it cannot be limited or restricted, and was not intended to be by the 14th section of it, and it does not appear that it has ever been so ruled by any court in this State.

Nields replied.

The Court overruled the objection and granted the motion for leave to amend the declaration.

McCormic then offered and read in evidence the certificate of In-

surance Commissioner of this State authorizing the incorporation plaintiff to do business in this State.

Also the three several applications of the defendants for insurance and their three several premium notes to the company, the signatures of the firm to the same and of the signature of the agent of the company to the said applications being mutually assented to by counsel on both sides for the purpose only of dispensing with the production of the formal proof of the genuineness of the said signatures respectively.

Massey objected to the admissibility of them on the ground that it appeared on the face of them from their dates respectively that they antedate the certificate of the Insurance Commissioner of this State to the company just before produced in evidence, and subsequent to the passage of the statute prohibiting foreign insurance companies from doing business in it without such a certificate. 16 Del. Laws, 29; 55 Ill. 86, 89; 80 Pa., 15, 28, *Cook & Pierce Case*; 2 Houst; 3 Gray, 215, 222; 3 Gray, 500; 55 Ver., 533; 11 Wis., 394, 397, 398; 12 How., 79; 5 Barn & Ald., 335; 13 Pet. 589; 8 Wall. 181.

There is nothing in the statute to give any retroactive operation or effect to the certificate of the insurance commissioner to be issued under it to any foreign insurance company.

McCormic in reply cited 109 U. S. 527; 62 Md. 204. Refers to our statute, 16 Del. Laws, 29, Sec. 2. No case has been cited in which such a company had failed to recover in such a case as this in which it had obtained such a certificate as this, and it so appeared in the report of the case. In the case before this court the certificate of the commissioner is in terms broad enough to cover the whole period from the time the statute went into effect (July 1, 1879) to the 30th of Jan., 1880. 60 N. H., 464; 70 Ind., 1.

Fulton. The certificate of the Commissioner of Insurance, who is a public functionary in the administration of the powers and duties of the office, is final and conclusive on every one, and cannot be contradicted or disputed here; and that it is retroactive as well as prospective, and by its terms covered the whole period from

the 1st of July, 1879 to the 31st day of January, 1880. Court adjourned until Monday next at 11 o'clock a. m.

Ignatius C. Grubb, J.: The corporation plaintiff has offered to put in evidence three several applications made by the defendants to the plaintiff for insurance, and also three several premium notes given by defendants to the plaintiff for three several policies of insurance on property of defendants situated within this State, given by the plaintiff when, as the plaintiff alleges in narr as amended at the trial of this cause, the said plaintiff was lawfully authorized to transact insurance business within the limits of the State of Delaware. The defendants have objected to the admission of said applications and notes as evidence in this cause on the grounds that these show on their face that the insurance business to which they relate was transacted during a time when, in fact, said plaintiff was not lawfully authorized to transact any insurance business within this State, and therefore that said applications and notes, if so admitted, would be evidence, not of a lawful, but of an unlawful insurance transaction within this State. The certificate issued by the insurance commissioner of this State to the plaintiff, already put in evidence, bears date November 28, 1879; and among other things shows its agents in Delaware to be L. P. Buck & Co., residing at Wilmington, in this State. The said applications and notes on their face show that they were made prior to the date of said insurance certificate, and at Wilmington, Delaware, and that the defendants as well as the plaintiff's said agent, through whom the entire insurance transaction appears to have been effected, all resided at that time in Delaware; while the notes import that they were given in consideration of the receipt of the said policies on the property in Delaware described in said applications.

The objection made by defendants to the admissibility of the applications and notes in question raises two inquiries:

First, Was the plaintiff at the time of the said transaction lawfully authorized to transact said insurance business within the State of Delaware?

Second, If not so authorized can the plaintiff recover in this action on the said premium notes any of the assessments sought to be recovered in this suit?

In the determination of the first inquiry it is unnecessary to consider whether or not the said plaintiff, being a corporation created exclusively under the laws of the State of Pennsylvania, could have lawfully transacted the said insurance business within this State, in case no statute of this State had been then in force forbidding its enjoyment of our comity for that purpose, unless it had first obtained authority therefor agreeably to the provisions of such statute. For in fact such a statute was then in force, having been passed March 24, 1879, and which expressly provided that its provisions in that behalf should go into effect and operation on July 1, 1879. Unless, therefore, the plaintiff is able to show that it had duly complied with the provisions of said statute it could not lawfully have transacted the said insurance business within this State. The principal object of this statute was to protect the citizens of this State who might seek to become holders of insurance policies against the fraudulent devices of spurious and insolvent companies. It therefore provided that there should be an insurance department to be administered by a State Insurance Commissioner, charged and clothed with all the duties and powers essential to the due fulfilment of the object of the statute. Among other things the said statute provided that every insurance company doing the business of insurance within this State should on or before the first day of July, 1879, and annually thereafter, on or before the first day of February, deliver to the insurance commissioner a full detailed statement of the condition and business of such company for the year ending on the previous thirty-first day of December, which statement should be verified by oath or affirmation and set forth the particular matters prescribed by the act. It further provided that every insurance company not incorporated under the laws of this State shall, before doing any insurance business within this State, deliver to the insurance commissioner a certified copy of its charter or declaration of organization, and also a certificate of the name and residence of some person or agent within this State upon whom service of process against such company may be made. And it also provided that if it shall appear by such statement and report or reports that such company is incorporated under the laws of any other State or foreign government, and is in good condition, and has assets to the amount of $150,000 over all liabilities and

claims, then the insurance commissioner shall issue a certificate authorizing said company to transact the business of insurance, and establish agencies in this State. The statute also expressly provides that "no insurance company or corporation shall be engaged in, prosecute, or transact any insurance business within the limits of this State without having first obtained authority therefor agreeable to the provisions of this Act;" and the Act further declares that every violation of this provision shall be a misdemeanor punishable by fine and imprisonment. It also prescribes that "all certificates and other official papers shall be accompanied with an impression of the insurance commissioner's seal of office," and further that "any instrument lawfully executed by the insurance commissioner of this State, and authenticated by his seal of office, shall be received in evidence in the courts of this State, and copies of papers and records in his office so authenticated, shall be received as evidence with the same effect as the originals." The said certificate issued by the said insurance commissioner, to the corporation plaintiff, bearing date November 28, 1879, on its face authorizes the plaintiff to transact the business of insurance and establish agencies in this State for and during the year ending January 31, 1880, and recites that the plaintiff had filed the detailed statement prescribed by the statute, containing the particulars therein required, together with a certified copy of its charter and the prescribed certificate of the name and residence of his agent within this State upon whom service of process may be made. The plaintiff therefore contends, in view of the foregoing provisions of the said act, and in accordance with the plaintiff's interpretation of the meaning and intent of the statute that the said certificate on its face implies, and warrants the presumption first, that the plaintiff's said statement was delivered to the said insurance commissioner on or before July 1, 1879, and prior to the transaction of any of the insurance business, in consideration of which said premium notes were given; and second, that by reason of such alleged delivery on or before said July 1, 1879, the said plaintiff was authorized to transact the business of insurance in this State from said date until January 31, 1880.

In the opinion of the Court this view is untenable. In the first place it assumes as fact what has not been established by any

evidence as yet presented in this cause, viz: That the plaintiff was actually doing the business of insurance within this State before or on July 1, 1879. Until this be first proven it cannot be presumed from anything now actually found in said insurance certificate that said statement was delivered to said insurance commissioner on or before said date. On the contrary it must be presumed that it was delivered to said commissioner on or about November 28, 1879, the day of the date of said certificate. For it is unreasonable to suppose or presume that said public officer would have disregarded his duty by delaying nearly five months to examine and determine the sufficiency of a statement when such duty might reasonably be discharged in less than that number of days. In the second place we find nothing in the statute to warrant the view that when the prescribed certificate is issued, the authority thereby conferred to transact insurance business relates back to the delivery of the said statement to the commissioner and legalizes all insurance transactions which may have occurred, despite the express prohibition of the statute, between the day of such delivery and the day of issuing such certificate. On the contrary, according to the correct interpretation of the statute, the said authority is not granted, nor is it either begun or obtained until the commissioner has examined and found sufficient the statement prescribed by the act, and thereupon issued the necessary certificate; and until the commissioner also has received the certified copy of the charter and the certificate of the name and residence of the agent, as required by the statute. Any other construction would lead to uncertainty and confusion in the administration of the law, and afford easy opportunity for the commission of the dishonest and fraudulent practices which the statute was designed to prevent. We are therefore of the opinion that the plaintiff, at the time of the aforesaid transaction, comprising the making of the said applications and notes now offered for admission, as part of the plaintiff's evidence in this cause, was not authorized to transact said insurance business in this State. We are further of the opinion that, not being so authorized, the plaintiff cannot recover in this action, on the said premium notes any of the assessments sought to be recovered in this suit. The plaintiff was, as has been shown, expressly prohibited by said statute from engaging in, prosecuting or transacting any insurance business

within the limits of this State without having first obtained authority therefor agreeably to the provisions of said act. Having transacted the insurance business in clear violation of the prohibitory provisions of the said statute, the contract made in reference thereto is illegal and void, and consequently no action can be maintained upon said contract, or upon the said premium notes. And this is so notwithstanding the statute did not declare that a contract made contrary to the provisions of it should be void. "For," to quote the language of this Court in the case of *Cook v. Pierce*, 2 Houston, 503, "a contract prohibited and made unlawful by statute is a void contract, although the statute does not expressly provide that it should be so." This principle, as enunciated in that case, has never been questioned by any subsequent adjudication in this State, while it has been recognized and affirmed by high authority elsewhere. We therefore feel constrained to adhere to it in this case, and to announce that, in our judgment, the said insurance applications and premium notes are not now admissible for the purpose of showing that the said notes were given by the defendants as a consideration for the lawful insurance by the corporation plaintiff of their said property situated in the State of Delaware. If this ruling shall prove fatal to the maintenance of the plaintiff's present action in this Court, it is, nevertheless, unavoidable. For, whether the plaintiff's violation of the plain letter of our statute has been occasioned by ignorance or willful transgression, it is in either case culpable. Our insurance act was a matter of public knowledge and general interest long prior to July 1, 1879, and was similar to those which had long been in operation in other states, and, therefore, the plaintiff and its agents should have taken notice of its existence, which could readily have been ascertained by the most ordinary diligence. The Court cannot sanction the plaintiff's interpretation of this act and hold that a foreign insurance corporation can transact insurance business in this State before it obtains the requisite authority, when the statute itself expressly forbids this, and then by subsequently obtaining the commissioner's certificate, render that lawful which the act had already made unlawful The obtaining the certificate showing a proper compliance with the statutory requirements is a condition precedent to the lawful transaction of any insurance business in this State, and our Courts must

of necessity hold that all premium notes given for such unlawful insurance cannot be enforced by the judicial tribunals of Delaware. Such is manifestly the intent and meaning of the statute, otherwise such foreign corporations as might escape its other penalties would be furnished the opportunity for first defrauding our citizens, and then in many cases evading our jurisdiction and escaping with impunity. Any other construction of our statute would tend to defeat the very object for which it was enacted, and leave our citizens unprotected against the fraudulent devices of those who might then with virtual impunity seek to make this State a convenient resort for the prosecution of dishonest insurance transactions.

Plaintiff took a non-suit.

JAMES SLAUGHTER *v.* TIMOTHY SLAUGHTER.

Guardian Bond—Payment of Distributive Share—Limitation.

Nothing but actual money, or what is accepted as such, is payment of a debt.

By the statute of limitations a lapse of three years after a minor comes of age is a complete bar to an action on a guardian bond for a distributive share of an estate, unless there be proof of a recognition or acknowledgement of indebtedness by the guardian within three years from the time of bringing suit.

(*Kent, April, 1887.*)

DEBT ON A GUARDIAN bond as guardian of the plaintiff then a minor. The bond dated June 6, 1861, penalty eight hundred dollars. Plea, statute of limitations.

The plaintiff came of age in 1877, and relied on an admission of the debt appearing on defendant's last account passed as guardian, and on file in the Register of Wills office, showing an amount due the plaintiff of one hundred and seventy-four dollars. The action was brought to the October term 1885.

James Slaughter, plaintiff, testified: The defendant admitted that he owed the debt to me in 1884 in the Register's office, and said that he expected to pay it and that he had paid all my brothers before that time.

Nathaniel Slaughter, brother of the plaintiff, who was present in the Register of Wills office, substantially corroborated the state- of the plaintiff as to what his uncle said to him at that time.

Timothy Slaughter, the defendant, remembered the meeting here in the Register of Wills office in August, 1884, referred to by the preceding witness. He then told the plaintiff that it had been paid and settled long ago, and that he would not pay it.

J. Frank Wilds testified: I was Register at the time and present in the office on the occasion referred to, and heard the defendant say to the plaintiff, that he had been paid, and that he did not owe it, and would not pay it. That his mother had bought at his administrators sale of his father's goods over fifteen hundred dollars worth and had never paid him for it, and that his brothers had all settled with him and released their claim against him in consideration of that fact.

C. H. B. Day, for the plaintiff, cited, 1 Harr., 204; 1 Salk., 28; Peak's N. P., 92; *Black's Ex'rs v. Reybold*, 8 Conn., 179.

James L. Wolcott, for the defendant, cited: 1 Peake, 351; 1 Houst., 260; 1 Houst., 441; 2 Greenl. Ev., Sec. 240; 3 Pars. on Cont., 68; 15 John's, 519; 14 Pick., 390; Part 1, Vol. 2, Smith Lead Ca., 867.

Day for the plaintiff in reply: There was a debt in this case at the time of the admission of it by the defendant, and we shall contend that the proof is that the admission of it as a subsisting debt at that time was unconditional and unqualified.

COMEGYS, C. J., charging the jury:

This is an action of debt on a guardian bond given in the Orphan's Court of this county on the sixth day of June, 1861, upon the appointment of the defendant as the guardian of the plaintiff, then a minor about six years and eight months old. The defendant was the administrator of the father of the plaintiff, and on the fifth day of February, 1866, passed a distributive account of

his administration, showing the share of the plaintiff to be the sum of one hundred and seventy-four dollars and sixty cents. This share carried with it interest at six per cent. from the time the account was passed. The plaintff came of age in 1875. The action on the guardian bond to recover the above sum and its interest was brought to the October Term of the year 1885, and ultimately pleaded to issue, breaches of the condition having been assigned covering the claim in controversy. The defendant's pleas, among others, are payment and the act of limitations. To the first of these (issues having been taken upon them all) the defendant offered his own testimony in its support; alleging that he had paid the plaintiff and there was nothing due him. Upon cross examination the defendant admitted that he had not paid the plaintiff any money whatever, but said he had paid him as he had paid the rest. Being asked how he had paid the rest, he stated that he had left with their mother, property she bought at the administrator's sale to the amount of sixteen or seventeen hundred dollars, for which she had never paid him anything. No other evidence of payment was offered. The plea of payment, therefore, we feel called upon to state to you is not supported by any such proof as the law requires, and is, therefore, not to be regarded by you as in any respect defeating the plaintiff"s claim. Nothing but actual money, or what is accepted as such, is payment of a debt. The case stands then solely upon the plea of the statute of limitations—in this case a perfectly good legal defence unless the defendant has deprived himself of the benefit of it by his own declarations. For although a statutory provision in the case of common claims, or lapse of time with respect to some others, may afford a party complete protection against a suit, yet he may deprive himself of the benefit of it by what is called an acknowledgment of the claim as a still subsisting demand for which he is liable. In the case before you the defendant, notwithstanding he had not actually paid the plaintiff his claim, being his share of his father's estate, yet after the expiration of three years from the time when the plaintiff came of age—which three years expired on the seventh day of October, 1878, had as complete a defence in law against the claim as if he had paid it in dollars and cents, the statute affording it.

A minor has three years after coming of age to sue his

guardian upon his bond for money due him on account of the guardianship. No action was brought by the plaintiff within the three years; therefore his case was flatly barred by the statute, unless he could show some legal recognition of the debt afterwards, to take away, or remove the statute bar. The whole case therefore has virtually been tried upon the issue joined on the plea of the act of limitations.

We do not propose giving you instructions as to what the law is in all cases where the aid of the statute as a defense is invoked—it being in this particular case by reason of the testimony given by the plaintiff's witnesses unnecessary, and opinions not called for by the case before the court are extrajudicial and of no authority. The point made and pressed by the defendant's counsel is, that to take a case from out the operation of the Act, that is to deprive the defendant of his defence of it on the ground of his admissions within the legal time, it must not only appear that his acknowledgment, if he made any, was unqualified, but also that it was accompanied by something which in law amounts to a promise, or recognition of liability to pay the debt sued upon. It is unnecessary to pass upon that point in this case, which is a debatable one, for if the witnesses of the plaintiff are to be credited, there was not only a recognition or acknowledgment of indebtedness in the Register's office in August, 1884 (about a year before the suit was brought), but a declaration that he should have to pay such indebtedness if it was demanded of him—which according to one at least of the witnesses was then and there done; but that is not material, for a suit brought, is a demand of a debt due, though such debt be payable specially on demand. They state that the defendant admitted that he owed the money; that it had never been paid, and that he should have to pay it if demanded. This language, if you believe it to have been uttered, satisfies the requirements of the cases and authorities cited by the defendant's counsel.

The testimony thus given, including that of the plaintiff as to the admissions of the defendant at another time, is rebutted, as to what took place in the Register's office, by the testimony of the defendant himself and the Register; and, as to what occurred afterwards, by the plaintiff.

The whole case then depends upon the testimony of the wit-

nesses. There is a complete conflict between these for one side and the other, and you must reconcile it the best you can. If you cannot reconcile it, then give your verdict to the side upon which there is the most weight of proof—that is the side you feel the proof requires that you should support.

I will repeat, that if you find for the plaintiff he is entitled to the amount of his claim; on the other hand, if you find the defendant's defence of the act of limitations to be unshaken by the plaintiff's proof, then, you should give the defendant your verdict.

Verdict for the plaintiff.

RIVERSIDE LUMBER CO. *v.* THOMAS S. HAMPTON, contractor, and JOHN F. RUTH, owner.

Mechanic's Lien—Structure—Fence.

A fence is a structure within the meaning of the Mecanic's Lien Law, but no part of a brick house which it adjoins or on the same property.

(*New Castle, May 26, 1887.*)

SCIRE FACIAS SUR LE MECHANIC'S LIEN.

Statement of the claim for lumber furnished to Hampton, contractor, and John F. Ruth, owner or reputed owner, for building three three-story brick houses, on southerly side of Linden street, near Franklin street, Wilmington.

Joseph Bellah, testified. Is treasurer of the company, it furnished the lumber for them and as delivered it was charged for on the books of the company. Its book of original entries was produced and proved by witness.

The question arose whether the materials furnished for a fence for the aforesaid properties were included in the lien.

Charles B. Lore and *Harry Emmons*, for plaintiff.

Johnson and *Hayes*, for defendants.

COMEGYS, C. J., charged the jury:

That the materials furnished for the fence were not covered by the claim as filed in the case, which was for materials furnished for the three brick houses specified in it, a fence being a structure within the meaning of the statute, but not a brick house or any part of it, unless so stated in the claim.

Verdict for the plaintiff.

COURT OF ERRORS AND APPEALS,

JUNE TERM,

1887.

DOE, demise of ANDREW B. COOPER, *v.* ROE, casual ejector, and ELLIS P. MILLER, SIMEON BLOOD, JR., and JAMES BIGGS, tenants in possession, and EZEKIEL W. COOPER, et. al., real defendants.

Will—Construction of.

Words will be interpolated into a will in order to elucidate its meaning and to render clear that which otherwise might be considered doubtful or uncertain; and in order to carry out the apparent intent of the testator the will will be construed as if said words had been inadvertently omitted.

The testator by his will created and established cross remainders among his several children respectively and their children lawfully begotten; so that his children and their children should inherit so long as any of them should survive with remainder over to strangers in fee upon the issue of his own body becoming extinct. Held that a son of one of the children of the testator, his father being dead, is entitled to an estate in possession of a proportional share of the lands devised to one of the testator's sons who had since died intestate without issue.

One of the sons of the testator having died intestate and without issue, the sole surviving son of the testator is not entitled to the whole of his estate in remainder but the children of the other children of the testator are entitled to the same share of said estate as their parents would have received had they been living, as per stirpes.

(*June 27, 1887.*)

EJECTMENT. CASE STATED. Questions of law reserved by the Superior Court of Kent County to be heard before the Court in bank.

Richard Cooper, the testator, in the 2d, 3d, 4th, 5th and 6th Items of his will, devised to each of his five children, by name, certain portions of his real estate, in severalty, for life only, remainder to the children of each, in tail, in the parts so devised, in part as follows:

Items 2. I give and devise to my son Doctor Ezekiel Cooper * * * * * for and during his natural life, and not to be taken nor construed to be any longer, or greater estate. And from and after his decease, I give and devise all the foregoing lands and premises unto the several children respectively of my said son Ezekial, both males and females, if he shall leave any at the time of his death, which are lawfully begotten of his body, unto them his said children, and the heirs of their bodies respectively lawfully begotten forever.

Item 3. I give and devise to my daughter Sarah Buckmaster * * * * * for and during her natural life, and not to be taken nor construed to be any longer or greater estate * * * * * and from and after the death of my daughter Sarah, I give and devise all the above mentioned tracts or parcels of lands * * * * * * to Richard Cooper Buckmaster, the son of my daughter Sarah, to him and the heirs of his body lawfully begotten forever * * * * * and from and after the death of my said daughter Sarah, I give and devise the lands and mills as above devised to my daughter Sarah for life, and also in case of default of lawful issue of my grandson Richard C. Buckmaster I give and devise the lands and premises as above devised to him in fee-tail together with the land and mills aforesaid, unto the several children respectively of my said daughter Sarah, both males and females, if she shall leave any at the time of her death, which are lawfully begotten of her body, unto them, her said children and the heirs of their bodies respectively lawfully begotten forever.

Item 4. I give and devise to my son Richard Jenifer Cooper * * * * * to him, the said Richard Jenifer Cooper, my son, for and during his natural life, and not to be taken nor construed to be any longer, or greater estate, and from and after his decease,

I give and devise all the foregoing lands and premises unto the several children respectively of my son Richard Jenifer, both males and females, if he should leave any at the time of his death which are lawfully begotten of his body, unto them, his said children, and the heirs of their bodies respectively lawfully begotten forever.

Item 5. I give and devise to my son Ignatius Taylor Cooper * * * * * for and during his natural life, and not to be taken nor construed to be any larger, or greater estate, and from and after his decease I give and devise all the foregoing lands and premises unto the several children respectively of my son Ignatius, both males and females, if he should leave any at the time of his death, which are lawfully begotten of his body, unto them, his said children, and the heirs of their bodies, respectively lawfully begotten forever.

Item 6. I give and devise to my son William Hughlett Cooper * * * * * for and during his natural life, and not to be taken nor construed to be any larger, or greater estate, and from and after his death I give and devise all the foregoing lands and premises unto the several children respectively of my son Wm. H. Cooper, both males and females, if he should leave any at the time of his death which are lawfully begotten of his body, unto them, his said children, and the heirs of their bodies respectively forever.—I give and bequeath to my son William H. Cooper a legacy of three hundred dollars, in order to make up the deficiency in the value of the real estate devised to him with that devised to my other children. And then proceeded, in Item 7th :

"*Item 7th.* Provided, nevertheless, in case any one or more of my said children should happen to die without leaving child or children, lawfully begotten of their bodies, that can take and hold my real estate, as my immediate devisees, agreeable to the true intent and meaning of this my will, then, in such case, I give and devise the lands and premises above devised to such child or children which may or shall happen to die as aforesaid, unto the survivor or survivors of my said children, during their natural life; and after their

decease, I give and devise the lands and premises, as aforesaid, to the child or children, both males and females respectively, of such survivor or survivors, lawfully begotten of their bodies, forever, and of any of my children, which may be dead, leaving such child or children, such child or children claiming such part or share as the parent or parents of such child or children would have claimed, if living, to be equally divided between my surviving child or children as aforesaid, and the child or children, lawfully begotten, of any that may be dead, claiming the right of their parent or parents, as if living, share and share alike, as tenants in common, and not as joint tenants, and to the respective heirs, as aforesaid, forever."

"And it is further provided, and it is my will, and desire and intention, that if the whole of my children should die without leaving lawful child or children, or legal descendants of such child or children, so that the whole of the lawful issue of my own body should become extent, then, and in such case, I give and devise the remainder and remainders, reversion and reversions, of my whole estate, in the manner and form following," etc.

The testator then devises over; and after the above devises over, the testator declares as follows:

"*Item 8th.* Be it known, that it is my express intention, in this my will, to create and establish cross-remainders, on and in the aforesaid estates, lands, and premises, among my several and respective children, and their children lawfully begotten, so that my children and their children, as aforesaid, shall inherit so long as any of them shall remain."

The testator then bequeaths certain personal estate specifically as follows:

"*Item.* I give and bequeath to my five children aforesaid, Ezekiel, Sarah, Richard, Ignatius, and William, all my bank stock in the Farmers' Bank of Delaware; that is to say, twenty shares to each and every one of them. Also, my bank stock in the Bank of

Caroline, in Caroline County and State of Maryland, from and after the marriage or death of my wife Clarissa; that is to say, to each and every one of them, severally, the number of ten shares, together with all the proceeds, dividends and profits thereof. I also give and bequeath to each and every one of my aforesaid five children, severally and respectively, the sum of twelve hundred and fifty dollars as a legacy, on the following terms and conditions; that is to say: That each of them, for him and herself, severally, shall marry, and have child, or children, lawfully begotten, at the time of their death; but in case any one or more of my said children should die, leaving no child or children, or lawful descendants, at the time of their decease, that then and in such case the bank stock and legacy bequeathed, as aforesaid, to such child or children so dying as aforesaid, shall go over and be equally divided to and amongst the survivor or survivors of my said children."

Then follows the residuary clause:

"*Item.* I hereby give, devise, and bequeath all the rest and residue of my real and personal estate whatsoever, to be equally divided to and among my five children, Ezekiel, Sarah Richard, Ignatius, and William, share and share alike; or if any one or more of my said children should happen to die without leaving children of their own bodies lawfully begotten, then in such case the share or shares of such child or children deceased, together with the aforesaid legacies to such child or children deceased, shall go to the survivor or survivors of my said children; to be equally divided, share and share alike; and if all my said children should happen to die, without leaving, of their own bodies, as aforesaid, heirs, and in such case, I give and bequeath unto my beloved wife, Clarissa, five thousand dollars of the aforesaid residue," etc., etc., etc.

Then occurs the following clause, contained in a codicil, dated July 22d, 1816:

"I do also declare, that it is my intention and will, that the whole of my estate, both real and personal, shall go to and be divided to and amongst my children and the lawful issue of their re-

spective bodies, so long as any of them shall remain ; and that no other person, in remainder, shall take or inherit any part thereof, so long as any of my children or their lawful issue shall survive."

And the following, contained in Codicil No. 2, dated October 27th, 1817 :

"I give and bequeath to my five children, one hundred and two shares of stock in the Bank of Caroline, which I purchased since the making of my original will, to be divided in the following manner, viz : To Ezekiel, twenty shares ; to Sarah, twenty shares ; to Richard Jenifer, twenty-two shares ; to Ignatius Taylor Cooper, twenty shares ; to William Hughlett Cooper, twenty shares ; and also to each and every of them, severally, an additional cash legacy, over and above the cash legacy left to each of them in my original will, the sum of seven hundred and fifty dollars, each, to be paid to them in good bonds, subject nevertheless to the like limitations, restrictions, conditions, as are mentioned in my original will, in case of either of my said children dying and leaving no children, relative to bank stock and cash legacies, therein mentioned."

Richard Cooper, the testator, died in 1818, leaving to survive him his widow and five children, viz: Ezekiel, Sarah, Richard J., Ignatius T., and William H., named in his will.

Ezekiel Cooper, one of the children of the testator, died in 1828, leaving to survive him four children, viz: Richard A., Ezekiel, Henrietta and Andrew B. Since the death of Ezekiel, two of his children, viz: Henrietta and Ezekiel, died, without issue, and since their death Richard A., another child of Ezekiel, died in 1874, leaving to survive him one child, Mary L. Raymond.

Sarah, another child of the testator, who intermarried with Charles Buckmaster, died in 1830, leaving to survive her three children, viz ; Sarah Ann, Ezekiel and Charles. Since the death of the said Sarah, Charles, one of her children, has died, without issue ; Ezekiel, another of her children, has died leaving to survive him two children, viz : Sarah Ann and Charles.

Richard J., another child of the testator, died in 1835, leaving to survive him one child, William P. Cooper, who died in 1861, and left to survive him his widow, Sarah L. Cooper, and one child, viz: Annie P. Cooper.

William H. Cooper, another child of the testator, died in 1847 without issue.

Ignatius T. Cooper, another child of the testator, died in 1884, leaving to survive him five children, viz: Richard G., Ezekiel W., William H., Alexander B., and Ignatius T.

The question is whether Andrew B. Cooper, the real plaintiff, and son of Ezekiel, a child of the testator, who died in 1828, is entitled to any, and if any, what estate, in possession, in the lands and premises devised by the testator to his son, William H. Cooper, for life, who died in 1847 without issue; and this question depends upon the construction to be given to the 7th item of the testator's will, and in giving such construction the Court will be aided by the 8th Item of the will, where the testator declares it to be his intention to create cross-remainders, etc., and also by the clause in the codicil dated July 22d, 1816, where the testator declares substantially that the whole of his real estate shall go to his children, and the heirs of their respective bodies, so long as any of them shall remain; and that no other person, in remainder, shall take or inherit any part thereof so long as any of his children, or their lawful issue, shall survive.

Edward Ridgely and *Beniah Watson*, for the plaintiff.

1. The Courts, in construing wills, endeavor to ascertain the intention of the testator by a fair interpretation of the words used by him, and when such intention is ascertained, such a construction will be given to the will as will carry into effect his intention, unless it is repugnant to some well established principle of law.

Cruise Digest, 6 *Vol.*, 172; *Rickards v. Adams and wife*, 1 Harr., 439; *Sapsley v. Sapsley*, 9 Pa. St., 130 etc.; *Harris v. Barry*, 7 Bush, 113 etc.

2. A particular intent will be held subordinate to a plain, general intent of the testator, where both cannot be effectuated.

Workman v. Cannon, 5 Harr., 91.

3. In the construction of wills the Court will adopt that construction which will best harmonize with the general and obvious scheme of the will; support and give effect to all its provisions; prevent disinheritance of the lineal descendants, and produce equality of benefits among those standing in equal, natural relations to the testator. If the language of a will is capable of two constructions, one of which would operate to disinherit a lineal descendant of the testator, while the other would not produce that effect, the latter should be preferred; and an intention to disinherit a lineal descendant will never be imputed to a testator by implication.

1 Redfield on Wills, 422 to 439, *et seq.*; *Low, Executor, v. Harmony*, 72 N. Y., 408; *In re Brown's Estate*, 93 N. Y. (Sickles' Court of Appeals), 295; *Minol v. Taylor and others*, 129 Mass., 160, &c.

4. When the words in a will are fairly capable of two constructions, one of which would cause an intestacy upon a certain event, and the other would avoid an intestacy upon any contingency, the Courts will always favor such a construction as will prevent an intestacy under any contingency that might happen. (In the case now before the Court, if the Court should give a construction to this will by which the lands devised to William H. should, after the death of Ignatius, the last survivor, go entirely to his children, then, if Ignatius had died without issue, there would have been an intestacy.)

Badger v. Gregory, 8 L. R. Equity Cases, 77 and 85; *Hurry v. Morgan*, 3 L. R. Equity Cases, 152, 156, 157, 158; *Waite v. Littlewood*, 8 L. R. Chan. Appeal Cases, 70–73; *Hodge v. Foot*, 34 Beav., 349, &c.; *Richardson v. Manning*, South Carolina L. and Eq., Law, Vol. 13, Equity, Vol. 12, 458; 5 Harr., 405.

5. It is established that where it is clear on the face of a will that the testator has not accurately or completely expressed his

meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention as collected from the context. The obscurity apparently existing in the language of the 7th Item of the will is cleared by inserting the conjunction "and" between the word "forever" and the word "of" in line 13 of the 7th Item, as printed in this brief. And it is perfectly manifest that the draughtsman, while penning this clause in the 7th Item, inadvertantly omitted to write the conjunction "and" between the words "forever" and "of."

1 Jarman on Wills, the 5th American from the 4th English Edition, 486, top paging; *2 Williams on Exec.*, 6th American Edition, 1164, and cases there cited; *Aulich v. Wallace*, 12 Ken., 535; *Redf. on Wills*, 454.

6. The declaration by the testator, in the 8th Item of his will, that it was his intention to create cross-remainders between his children and their children, &c., and the clause in the codicil above referred to, both require that the language in the 7th Item of the will should be so construed as to give the lands devised to William H. for life unto the children of those children of the testator who died before William H., equally, *per stirpes*, with the children of Ignatius, who survived William H. Any other construction would defeat cross-remainders between the stocks of the testator's children, and would be directly opposed to his express declaration in the 8th Item and in the clause of the codicil above referred to, and would cause an intestacy in case Ignatius had died without children.

Badger v. Gregory, 8 L. R. Equity Cases, 77 and 85; *Hurry v. Morgan*, 3 L. R. Equity Cases, 152, 156, &c.; *Hannaford et al. v. Hannaford et al.*, 7 L. R. Queen's Bench, 116, &c.; *Washb. on Real Property*, 235.

7. "A gift of real or personal estate to several persons for life, with several remainders to their children, and if any of them die without children, then to the survivors for life, and afterwards to their children. Here it is improbable that a testator should intend to make the interest of the children depend on the accident of whether their parent (whose interest ceases on death) dies first or

second; and if to this be added a gift over, in the event of all dying without children, the conclusion is irresistible that what the testator meant was that as long as there were descendants of any to take they should take the whole; and the only mode by which effect can be given to this intention is by holding that cross-remainders are created between the stocks, irrespective of the periods at which the parents die, by reading "survivors" as "others." The authorities from Lord Thurlow's time downwards are almost uniformly in favor of reading "survivors" as "others" in such a case."—Remarks of Vice Chancellor James in *Badger v. Gregory*, 8 L. R. Equity Cases, 84-85.

8. The fact that the ultimate gift over is to the survivor of the class makes no difference. To whomsoever it is given an intention is equally manifest to make a complete disposition of the property, and that all should go over in one mass; and if "survivor" be construed strictly, there would be an intestacy in case the last survivor died without issue.

Wake v. Varah, 2 L. R., Ch'y D., 357; *Hurry v. Morgan*, 3 L. R. Eq., 152; 2 *Jarm. on Wills*, 702.

9. Where there is a devise of real estate to several persons for life, with remainder to their children, severally, in tail, and if any of them die without children, then to the "survivor," or "survivors," for life, and afterwards to their children in tail, and an ultimate devise over in case they all die without issue, in all such cases the word "survivor," or "survivors," are given their broad and liberal meaning, and are construed surviving stock and applied to the whole line of descendants, and such construction applies equally to gifts of personal property limited in like manner. In other words, the so-called stirpital construction is adopted as the proper one. The ground for such construction is the ultimate gift over in case all the children should die without issue, for the testator's intention is manifest that the whole shall go over in mass, and not in fractions at different times. (In the present case there is an ultimate gift over to collateral kindred of the testator in the event of all his children dying without issue.)

2 *Jarm. on Wills*, 5th American from the 4th English, 690,

etc.; 2 *Williams on Exec.*, 1577; *Badger v. Gregory*, 8 L. R. Equity Cases, 77; *Harry v. Morgan*, 3 L. R. Equity Cases, 152, 156, 157, 158; *Holland v. Allsop*, 29 Beav., 498; *Wake v. Varah*, 2 L. R., Ch. D., 348, etc.; *Waite v. Littlewood*, 8 L. R. Chancery Appeal Cases, 70, 73; in re Walker's Estate, *Church v. Tyacke*, 12 L. R. Chan., Division, 205, in 1879; *Cooper v. McDonald*, 16 L. R. Equity Cases, 258, 272; in re Tharp's Estate, 1 *De Gex., Jones & Smith*, R., 453, etc.; *Theobold on Will*, 2 Ed., 1881, 504; *Hawkins on Wills*, star paging 203 & notes; in re Palmer's Settlement Trusts, 19 L. R. Equity Cases, 320; in re Arnold's Trusts, 10 L. R. Equity Cases, 251, etc.; *Cross v. Malby*, 20 L. R., Equity Cases, 378, etc.; *Hodge v. Foot*, 34 Beav. 349, etc.; *Smith v. Osborn*, 6 H. L. C., 376, etc.; in re *Usticke Will*, 35 Beav., 338.

In this case there was no bequest over in the event of all dying without issue, but the Court said: "but those in which there is a gift over, if the whole class die without issue, are quite distinct, for there would be an intestacy, unless the words were construed 'other,' or 'others.'"

In re Keip's Will, 32 Beav., 122; *Lucena v. Lucena*, 7 L. R. Chancery Division, 255, 259, 268; *Wilmot v. Wilmot*, 8 Vesey, 10; *Cole v. Sewell*, 2 H. L. Ca., 186; *Doe, on demise of Watts, v. Wainright*, 5 T. R., 427; 2 *Jarm. on Wills*, 555, that cross-remainders may be limited of estates for life and estates in tail.

10. The object and design of the testator, as shown throughout his will, especially in the disposition of his real estate, is to provide equally for his children, and their children, giving to his children an estate for life, and to their children an estate in tail. It is unreasonable and improbable that the testator's bounty was made to depend upon the accident of Ignatius being the only survivor of William H., and by reason of such accident that Ignatius' children, who were unborn at the time of the testator's death, and who were no nearer to the testator than his other grandchildren, should have a double share of his real estate. It is evident, from the language of the will, that the testator meant "that wherever there was a failure of a particular *stirps*, the share of that *stirps* should accrue to the other *stirpes*, and go in the same manner as the original shares." There is a just disposition in the Courts in doubtful cases

to lean to that construction which makes a complete provision for all those children or descendants who were manifestly the objects of the testator's bounty.

Badger v. Gregory, 8 L. R., Chancery Appeal Cases, 70, 74, by Lord Selbourne overruling the Master of the Rolls.

11. It is submitted that, independent of adjudicated cases, a fair and reasonable interpretation of the words used by the testator in the 7th Item will entitle the plaintiff in this suit to an estate in possession in the lands devised to William H. for life, that is, to an equal moiety of an undivided fourth part of said lands, in tail general. The testator has in this Item provided for the very contingency which has happened, for he has said if *any one* or more of my said children should die, &c., then I give said lands to the "survivor," or "survivors," for life, evidently contemplating the death of one without issue, leaving only one of his children surviving; and it is unreasonable to conjecture that the testator, while penning the 7th Item, only contemplated the death of one of his children without issue, leaving two or more surviving, and afterwards the death of one of those survivors leaving children. Stripping the clause in question of some of its redundant expressions and preserving the words of the testator, it is suggested that this clause may be fairly read and interpreted as follows: Provided, nevertheless, in case any one or more of my said children, should happen to die without leaving child or children, lawfully begotten of their bodies, that can take and hold my real estate, as my immediate devisees, agreeable to the true intent and meaning of this my will, then, in such case, I give and devise the lands and premises, above devised to such child or children which may or shall happen to die, as aforesaid, unto the survivor or survivors of my said children during their natural life; and after their decease (that is the decease of the last survivor) I give and devise the lands and premises aforesaid unto the lawfully begotten child or children, both males and females, respectively, of such survivor or survivors forever, *and* of any of my children which may be dead (that is dead at the time of the death of the one so dying without issue), leaving such child or children, such child or children (that is the child or children of a predeceased child or children of the testator)

claiming such part or share as the parent or parents of such child or children would have claimed if living, to be equally divided between my surviving child or children, as aforesaid, (that is the children of the survivor or survivors) and the child or children, lawfully begotten, of any that may be dead (that is the children of any who may have died previous to the death of the one dying without issue), claiming the right of their parent or parents as if living, share and share alike, as tenants in common, and not as joint tenants, and to their respective heirs, as aforesaid, forever. It is evident that the words " my surviving child or children," in the clause, to be equally divided between my surviving child or children as aforesaid, mean the child or children of the survivor or survivors, for two reasons: First, he is providing for a division of the property after the death of all of his children. Secondly, the words at the conclusion of the sentence " to the respective heirs, as aforesaid, forever," show that he meant these words of limitation to apply to his grandchildren, and not to his own children, for he has uniformly given to his own children an estate for life only, and to his grandchildren an estate tail.

It is further respectfully submitted, that the construction contended for by the plaintiff in this case will best harmonize with the general and obvious scheme of the whole will; will support and give effect to all its provisions; will prevent an intestacy, which might have occurred by the death of the last survivor without children; will produce equality of benefits among those standing in equal natural relations to the testator, and will carry into effect the manifest intention of the testator.

12. If the construction contended for by the defendants be correct, and if the first child of the testator had died leaving issue, and afterwards three others had died without issue, and then the survivor had died leaving issue, the children of the last survivor would become entitled to four-fifths of the testator's whole real estate. Such an unfair and unjust discrimination in favor of the children of the last survivor as against the children of the child who died first cannot reasonably be imputed to the testator; and it is believed that such an intention so to discriminate unequally between descendants equally near to him cannot fairly be gathered

from the language used by him in his will and the codicils thereto.

13. No one can read the 7th Item in connection with the 8th Item, where the testator declares it to be his intention to create cross-remainders, and with the clause in the codicil above referred to, as a whole, and not see plainly and distinctly that it was the intention of the testator to keep the property together, and to divide the accruing share, which happened by the death of William H. without issue, after the death of the last survivor, between the issue of all the children of the testator, who had died either before or after William H., leaving issue, equally per *stirpes*, and that the gift of the original shares is the scheme which was to govern the devolution of the accruing share.

Nathaniel B. Smithers and *George V. Massey* for the defendants:

The testator's sons and daughter took estates for their respective lives in the parcels of real estate devised to them severally, with contingent remainders in their respective parts to their respective children and issue of such, lawfully begotten, who might be living at their respective deaths, by purchase, as tenants in common, if more than one, in tail general, such issue taking per stirpes; with cross remainders in tail between such children and issue in such respective shares; with cross remainders over in each of such respective parts originally devised or subsequently accrued, on failure of such child, children or descendants of any one son or daughter living at the time of his or her death, to the survivor or survivors of the testator's sons and daughter, for life; with remainder in tail general to the child or children or descendants of each surviving son or daughter respectively in such accrued share, by purchase, as tenants in common, in like manner as in the original share given to such son or daughter respectively; with cross remainders between such children, or descendants of such, in such accrued shares respectively in like manner as in the part originally devised; with cross remainders in tail in such original and accrued parts respectively upon failure of descendants of any one child to the issue, lawfully begotten, of each of the other sons and daughter of the testator according to stocks, by purchase, as tenants in common,

such issue taking per stirpes; only modified as to the parcels originally devised for life to Sarah, by the gift in tail to Richard Cooper Buckmaster; and upon failure of all the descendants of the the testator, remainder to his devisees over as provided in the will.

1. The inconvenience or absurdity of a devise is no ground for varying the construction where the terms of it are unambiguous; nor is the fact that the testator did not foresee all the consequences any reason for so varying.

2 Powell on Devises, 4, Rule XI; *Bird v. Luckie*, 8 Hare, 306, [32 E. Ch. Rep., 301.]

2. Words are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense is manifest from the paper itself.

2 Powell on Devises, 4, Rule XIV; *Wigram on Wills*, Prop. 1; *Hicks v. Sallit*, 3 De Gex., MacN. and Gordon, 782; in re Parker, 15 Ch. Division L. R., 528; *Kean v. Roe*, 2 Harrington, 103.

3. Words occurring more than once in a will shall be presumed to be used always in the same sense unless a contrary intention appear by the context.

2 Powell on Devises, 5, Rule XVI.

Every word must have its due weight and legitimate construction, and no word shall be altered, eliminated or added without imperative necessity shown by something in the will.

ANALYSIS OF ITEM 7.

The testator having given in severalty to each of his five children by name, an estate for life in the lands devised to him or her, with contingent remainder to the children of such child in tail general, adds Item 7, stating with a proviso:

"*In case one or more of my said children.*"

"*One or more*" provide for successive deaths—"*of my said*

children." These words undoubtedly mean the five children *named* and are equivalent to a repetition of them individually.

"*Should happen.*"—simply import contingency.

"*To die without leaving child or children lawfully begotten of their bodies.*"

"*Without leaving child or children*"—at the time of his or her death—"*lawfully begotten.*" These words occur throughout the whole will and mean *legitimate issue*, not being intended as words of procreation giving an estate tail to the parent.

"*Of their bodies.*" Of their several bodies. This is an example of the use of the word "their," in a several sense of which another more important instance will soon occur.

"*That can take and hold my real estate as my immediate devisees.*" This fixes the contingency as contemplated to happen at the death of the first taker for life. By the words "*my immediate devisees,*" he indicates the descendants of the child, who were *first to take* by *purchase* as tenants in tail.

"*Then, in such case.*" Simply words of contingency.

"I give and devise the lands and premises above devised to such child or children which may or shall happen to die as aforesaid."

This requires no comment. It is merely devising over the lands which he had first given for life, upon the happening of the contingency pointed out by the words "*as aforesaid.*"

"*Unto the survivor or survivors of my said children during their natural life.*"

"Unto the *survivor or survivors.*" Independently of the rule requiring the application of the ordinary sense of these words they must here receive literal construction, for they are expressly confined to it by the context, and mean *that one or more* of the testator's *children* living at the happening of the death of a child without leaving issue to take and hold as his immediate devisees.

"*Of my said children.*" By the word "*said*" the testator explicitly refers to his prior enumeration and thus, in effect, repeats their names and confines the term "*survivor or survivors*" to his "*said children,*" and by the words "*my said children,*" he further confined the term "*survivor or survivors*" to his own sons and daughter.

"*During their natural life.*" By the devise *for life* he still further and clearly fixes the meaning of "*survivor or survivors*" as restricted to those of his immediate children living at the happening of the contingency--because to *his children only* were such estates given. The descendants of his children always took *in tail.* Whoever was intended here as *a survivor* took only *for life,* and therefore a "*child*" of the testator is plainly indicated—otherwise he would have given to his *grandchildren* estates for *life,* which is aganist the whole scheme of the will.

"*And after their decease.*" That is, after the decease of the "*survivor or survivors,*" whomsoever he meant by those words being tenants for life.

"*Their.*" This word means the decease of his children being such survivor or survivors, *consecutively,* and not as importing survivorship among such children until the death of the last survivor, as will directly appear.

"*I give and devise the lands and premises as aforesaid.*" The only question here arises on the meaning of the words "*as aforesaid.*" He had given to *his children* life estates, and to *their* children estates tail, and in the devise just made to the "*survivor or survivors of his said children*" he had expressly restricted the interest to an estate for life, but now giving over to the grandchildren, on the death of such survivor leaving such children he gives "*as aforesaid*" meaning in tail as before given.

To me this is clearly its proper meaning here, but whether it be descriptive of the nature of the estate or of the corpus is immaterial to the question concerning the person taken.

"To the child or children both males and females respectively of such survivor or survivors, lawfully begotten of their bodies forever of any of my children which may be dead leaving such child or children."

This is a devise, to take effect upon the death of one or more of his children to whom as being then a survivor he had given an estate for life on the death without issue of the first taker for life. This is absolutely clear.

This devise over is explictly "to the child or children both males and females of *such survivor or survivors.*"

This phrase as explicitly excludes every child from taking at that time who is not a child of a survivor.

The words "such *survivor or survivors*" definitely show the person or persons whose children were then to take and defines them to be the person or persons who as survivor or survivors took the estate for life upon the death without issue of the child of the testator who was originally first devisee for life.

"*Lawfully begotten of their bodies forever.*" These words necessarily refer to the "*child or children*" of such survivor or survivors, and mean simply that any such child or children must be legitimate. By the word "*forever*" the testator meant so long as such issue shall continue, or to heirs in tail, using here the same expression with which he closes each of the original devises.

"Of any of my children which may be dead leaving such child or children."

This clearly relates back to the words "*survivor or survivors*" as the last antecedent and is in continuation of the gift to the child or children of such survivor or survivors of any one or more of testator's children as being such survivor and taking a share for life should afterwards die leaving child or children lawfully begotten.

"Such child or children claiming such part or share as the parent or parents of such child or children would have claimed if living."

"*Such child or children.*" What child? Clearly the child or children of a "*survivor*," for only to such children was there any devise over. This is the devolution of the remainder in tail after the life estate of a parent was exhausted.

"*Claiming such part or share.*" What the parent would have held if living, the children were to take per stirpes. Now it is clear that no parent who did not come within the category of "*a survivor*" ever took anything as a remainder for life contingent upon the death of a child of the testator without leaving issue at his death.

"*To be equally divided between my surviving child or children as aforesaid and the child or children lawfully begotten of any that may be dead claiming the right of their parents as if living share and share alike as tenants in common and not as joint tenants and to the respective heirs as aforesaid forever.*"

This sentence is all important as it puts the meaning of the testator beyond controversy.

1. By the words "*equally divided*" it establishes a tenancy in common in *equal parts.*

2. That tenancy is common between a "*surviving child or children*" *of the testator* and the child or children of some one or more that may be then dead.

3. This tenancy in common arises upon the death of some one of the children of the testator who took a share in remainder for life in the lands devised to a child whose life estate had expired without issue who could take in tail as the immediate devisees of Richard Cooper.

4. Now it has been established that no child so took unless he or she *survived* the child or children so dying and was then living.

5. This tenancy in common must therefore take place between "surviving children" of the testator and the children of a dead "survivor," for not only do the words so import, but in no other

way can the shares be made equal without taking away from a living child of the testator a portion of that which he had. Thus:

Ezekiel died first, leaving issue; then Richard J. died, leaving issue. Now suppose William had then died without issue, leaving Sarah and Ignatius living. It is settled that Sarah and Ignatius would have taken William's lands in moieties for life. Then should Ignatius die, leaving issue, a tenancy in common is created in equal shares between Sarah and the issue of Ignatius, claiming per stirpes—the issue taking in tail, and Sarah holding for life as in her original share. But if upon the death of Ignatius the children of Ezekiel and Richard should be let into participation equally of the share of William, it would reduce Sarah's moiety to a fourth. This is absurd.

The words "my surviving child or children" are exact equivalents of "the survivor or survivors of my said children," and indicate precisely whom the testator meant.

"*As aforesaid,*" occurring after the words "*my surviving child or children,*" signify "*for life.*"

"*As aforesaid,*" occurring after the word "*heirs,*" signify "*in tail.*"

The following clause of the item providing that the whole of the lawful issue ot the testator's body should become extinct before the remainders over should take effect, would have admitted the implication of cross remainders among the tenants in tail, but the testator did not choose to let it rest upon such *implication,* but by the next item declared such remainders expressly "on and in the aforesaid estates, lands and premises among my several and respective children and their children lawfully begotten, so that my children and their children, as aforesaid, shall inherit so long as any of them shall remain."

"*Among my several and respective children.*"

Now if there be anything clear in this will it is, that the

"several and respective children" of the testator took *estates for life*, and "their children" took estates tail. Among "children" of the testator therefore there could be cross remainders "*for life*," and among "their children" there could be cross remainders *in tail* passing from one to the other, but as between a child and a grandchild this was impossible, for in no event did the one take an estate of the same quality which was devised to the other.

"*So that.*" In such wise. This indicates the general intention of the testator. The mode and order of limitation by which it shall be effected must be gathered from the other clauses of the will.

"*My children and their children, as aforesaid, shall inherit so long as any of them shall remain.*"

My children—as aforesaid=for life.

Their children—as aforesaid=in tail.

"*Inherit.*" This word, as applied to *the children of the testator*, is inappropriately used, inasmuch as they took for life only, but as it followed immediately after the words "*their children as aforesaid*," describing persons who took inheritable estates, the mistake was one readily to have been made.

"*So long as any of them shall remain.*" This explicitly declared the intent to be that not until the entire extinction of the lineal descendants of the testator should any part of the lands previously devised go over to any person not so descended, a purpose plainly manifest throughout the whole will, and specially further declared in the codicil dated July 22, 1816, but which added neither clearness nor force to an intention already apparent.

This construction gives effect to every word in the will—gives to each word its proper and ordinary meaning, and changing nothing—striking out nothing—transposing nothing, it fully carries out the declared intention of the testator.

Doe, ex dem. Cooper, v. Townsend, et. al., 1 Houston, 365. Case stated.

This case cited in *Wylie v. Lockwood*, 86 New York *Rep.*, 292.

Accord. *In re Horner's Estate*, 19 *Chancery Division*, 186.

Examples of cross remainders between the issue of the same parent, followed by cross remainders between families:

Sugden on Property, Mar., 283., 64 *Law Lib.*, 206.

Wren, et. al., v. Clayton, 6 *East.*, 629. 2 *Powell on Devises*, 333, [*623.*]

Estate devised to childred for life with contingent remainder in tail to their children with cross remainders in tail between them and if any of the children of the testator should die without issue to take the share given for life to the parent, such share to go among the surviving children for life with remainder in tail among the children of such surviving child or children in like manner as in the original.

Cursham v. Newland, 4 *Meeson & W.*, 100-340.

SAULSBURY, CHANCELLOR:

Richard Cooper, at that time a prominent citizen of Kent county, in this State, duly made and published his last will and testament on January 23, 1816, and died without having revoked the same in 1818.

He left to survive him a widow and five children, viz.: Ezekiel, Sarah, Richard J., Ignatius T., and William H.

To each of his five children he devised in severalty, portions of his real estate, in similar terms, which terms may be sufficiently understood by reference to the different items of his will in which the several devises are contained.

The sixth item is as follows: "I give and devise to my son, William Hughlett Cooper, * * * * * for and during his natural life, and not to be taken nor construed to be any longer or greater estate. And from and after his death, I give and devise all the foregoing lands and premises unto the several children, respect-

ively of my son William H. Cooper, both males and females, if he should leave any at the time of his death which are lawfully begotten of his body, unto them, his said children, and the heirs of their bodies respectively forever, I give and bequeath to my son, William H. Cooper, a legacy of three hundred dollars in order to make up the deficiency in the value of the real estate devised to him with that devised to my other children.

Similar devises of his real estate for their natural lives, and not to be taken nor construed to be any larger, or greater estate were made to his other children respectively, and from, and after their deaths, respectively, were made unto their several children respectively, of the portions of real estate devised by the testator to his children respectively.

It is this item of the testator's will to which we are now to give a construction.

The seventh item of the will is as follows: "Provided, nevertheless, in case any one, or more of my said children shall happen to die without leaving child or children, lawfully begotten of their bodies that can take and hold my real estate, as my immediate devisees agreeable to the true intent and meaning of this my will, then in such case, I give and devise the lands and premises, above devised, to such child or children which may, or shall happen to die as aforesaid unto the survivor, or survivors, of my said children, during their natural life, and after their decease I give and devise the lands and premises aforesaid, to the child or children, both males and females respectively of such survivor, or survivors, lawfully begotten of their bodies forever of any of my children, which may be dead leaving such child, or children, such child, or children claiming such part, or share as the parent, or parents, of such child, or children would have claimed, if living to be equally divided between my surviving child, or children as aforesaid, and the child, or children lawfully begotten, of any that may be dead claiming the right of their parent, or parents as if living, share and share alike, as tenants in common, and not as joint tenants, and to the respective heirs, as aforesaid, forever; and it is further provided, and it is my will, and desire, and intention, that if the whole of my children should die without leaving lawful child or children, or legal descendants of such child, or children, so that the whole of

the lawful issue of my own body should become extinct, then and in such case, I give and devise the remainder, and remainders, reversion and reversions of my whole estate in the manner and form following: (Here follow devises to divers persons in fee and in tail not being children or descendants of the testator.)

The eigthth item of the will is as follows: "Be it known that it is my express intention in this my will to create and establish cross remainders on and in the aforesaid estates, lands and premises among my several and respective children and their children lawfully begotten, so that my children and their children as aforesaid shall inherit so long as any of them shall remain."

In a codicil to his will dated July 27, 1816, the testator declared that it was his intention and will that the whole of his estate both real and personal should go to, and be divided to, and amongst his children, and the lawful issue of their respective bodies so long as any of them should remain. And that no other person in remainder should take or inherit any part thereof so long as any of his children or their lawful issue should survive.

Ezekiel Cooper one of the children of the testator died in 1828, leaving to survive him four children, one of whom is Andrew B., the plaintiff.

The testator's daughter Sarah, died in 1830, leaving to survive her three children, Richard I., another of children died in 1835 leaving to survive him one child. William H. Cooper, another child of the testator, died in 1847 without issue. Ignatius T. Cooper, another child of the testator, and the surviving one of the testator's children, died in 1884 leaving to survive him five children, viz: Richard G., Ezekiel W., William H., Alexander B. and Ignatius T.

The question for us to decide is whether Andrew B. Cooper, the plaintiff in the Action of Ejectment in the Superior Court in and for Kent County, in the State of Delaware, a son of Ezekiel Cooper, a child of the testator who died in 1828 is entitled to any and if any, what estate in possession devised by the testator to his son William H. Cooper, for life, who died in 1847 without issue.

In deciding this question it is necessary to consider every provision of the testator's will, having a relation thereto.

First, I remark that it is apparent from careful consideration of the proviso contained in the seventh item of the will, that to a

clear and full understanding of that proviso, that the word "And" should be read between the words "forever" and "of" in the thirteenth line of said proviso on the plaintiff's brief and in the twelfth line on the defendant's brief.

The Court in construing that proviso is justified and has authority to consider that that word was intended or meant by the testator so to be introduced, and was omitted from accident or inadvertence, and its insertion in a proper consideration of this provision of the testator's will whether absolutely necessary or not, would clearly elucidate his meaning and render clear that which otherwise might by others be considered doubtful or uncertain.

That it is perfectly competent for the Court to construe the will as though this word was inserted if they believed such an insertion would manifest more clearly the testator's intention is too clear to need authorities and will not I presume be seriously questioned by any one familiar with the rules of correct interpretation.

Properly to interpret the will of the testator, and to give full effect to all of its provisions, we must bear in mind that he has declared therein, that it is his intention that the whole of his the estate, both real and personal, shall go to, and be divided to, and amongst all his children and the lawful issue of their respective bodies, so long as any of them shall remain, and that no other person in remainder shall take or inherit any part thereof so long as any of his children or their lawful issue shall survive. He also declared as his expressed intention in his will to create and establish cross remainders in the aforesaid estates, lands and premises among his several and respective children, and their children, lawfully begotten, so that his children and their children shall inherit so long as any of them shall remain.

It was manifestly the intention of the testator to preserve his estate to his children, and to their children, and to the issue of their children to the exclusion of all others not of his family, as long as any member of his family should exist, and although there was a devise over to persons not members of his family, he expressly provided that those named in such ulterior devise should take nothing under the same until his entire descendants should become extinct.

Equality of benefit among his children and their children, and

the issue of his children is a marked characteristic of the testator's will.

To give effect to the testator's will in this respect it becomes necessary to ascertain the true meaning of the words "survivor" or "survivors" as used therein.

It must be observed, that the children of his children respectively, and the issue of such children were intended to be objects of the testator's bounty, and of equality in the enjoyment of that bounty is as plainly evidenced as is this intention in respect to his immediate children.

Now, can it be reasonably supposed that the equality of benefit in any portion of his estate to any of his children's children or their issue should depend upon the uncertain event of the parent of such children or issue being the last survivor of all the children of the testator?

Could the mere accident of survivorship, of any one of the children, of the testator destroy that equality of interest in all his grand-children and their issue, which the testator clearly indicates and expresses throughout his whole will to be his intention?

Is is possible that such an accident shall confer upon the children of Ignatius T. Cooper, one son of the testator, who in this case happened to be his surviving child, such absolute advantage of benefir, under his will, over the children of Ezekiel, Sarah and Richard; also standing in the same relation to the testator, and equally, objects of his bounty?

Did the testator intend any such superiority of advantage to the issue of Ignatius T. over the issue of his other children, simply because the former happened to survive in point of time the latter?

What then is the meaning of the word "survivor or survivors," as used by the testator in his will?

The following principles have been decided and considered in well adjudged cases.

If there be an *absolute* gift to several persons with the gift to the survivors, if any die without issue "survivors" must be construed in its ordinary sense.

The defendants claimed the benefit of this principle or rule, because they are the children of Ignatius T. Cooper who was the

surviving son of the testator, and contend that they, by reason of the survivorship of their father, became under the will of their grandfather, entitled to that portion of his real estate devised to William H. Cooper their uncle, who died without issue.

It must, however, be observed that the gifts or devises to the five children of Richard Cooper the testator were not in themselves *absolute*, and this fact when taken in connection with other portions of the testator's will, does not bring the contention of the defendants clearly within the principle above announced.

Another principle of interpretation is, that where there is a gift over to take place only in the event on which the property is limited to the first legatees, among whom there is to be survivorship, happened in respect to all these legatees, survivor will be construed "other" so as not to cause an intestacy.

Now in the present case as there was a devise over to persons not members of the testator's family, and as the testator declared in his will, that such persons should not take any portions of his estate so long as any of his descendants should remain, it would follow if the contention of the defendants be correct that had Ignatius T. died without children or issue, there must have been an intestacy as to that portion of the testator's real estate, devised to William, and this notwithstanding there might have been children or issue of Ezekiel, Sarah and Richard who were descendants of the testator at the time of the death of Ignatius without children or issue.

Another principle of interpretation is, that where there is a devise to sons, and the heirs of their bodies and if any die without issue to the survivors and the heirs of their bodies, and if all die without issue over, survivorship shall be referred to the *stirpes* and not to the first taker, and the share of a son dying without issue will go among the issue of a son previously deceased, and the surviving sons.

In such a case says Mr. Theobald, in his able and excellent treaties on wills, "the testator has expressed his intention of benefiting the line of issue, and the survivorship contemplated is one between the respective *stirpes*, and not between the first takers merely,and this coupled with the gift over which can only take ef-

fect if all the sons die without issue, is sufficient to enlarge the meaning of the word survivor."

The same principle will be applied to the case where the will gives life estates with limitations expressly to issue,followed by a gift on failure of issue of any of the tenants for life to the surviving tenants for life for their lives, and then to their issue, and an ultimate gift over on failure of issue of all the tenants for life. "There is here," says the same distinguished author, "the same evidence of intention to benefit the issue, and the gift over shows that survivership is contemplated not merely between the first takers but between the respective stirpes."

I have carefully examined the cases of *Hurley v. Morgan*, L. R., 3 Eq., 152; *Badger v. Gregory*, 8 Eq., 78; *Waite v. Littlewood*, 8 Ch., 70; *In Re Palmer's Trusts*, 19. Eq., 320., and many other adjudged cases, and find this last principle fully supported by well adjudged cases.

The consideration of the question as to when the words "survivor" or "survivors" shall be construed "other" or "others" may be confirmed by reference to the case *In re Keeps'* will, 32 Bevan., 122.

The master of rolls said in that case "that there was no question but that the rule of law as laid down by modern authorities that the word survivors is to be confined to the literal signification of survivors at the period spoken of by the testator, in every case where it is possible to do so, without violating the clear meaning of the rest of the will, and that the burden of proof lies on those who contend for a different construction to show from the words of the will taken together that the true meaning of the word as used by the testator is "others," and not "survivors."

This is a fair statement of the question of constuction.

The plaintiff in the action in the Superior Court by which the question to be decided has been reserved for our decision, must show that the true meaning of the words of the will of Richard Cooper, his grandfather, as used by the testator is "other" or "others" and not survivor or survivors in their restricted sense, and that applying the words strictly would be violating the clear meaning of the rest of the will, and that the clear meaning of the

rest of the will requires an enlarged meaning of the words "survivor" or "survivors."

The master of the rolls, however, *In re Keep's Will*, while adhering rigidly to the rule that the word "survivors" is to be constoued strictly when it is possible to do so, was of opinion that the testator had plainly expressed his intention that the word survivors in the will he was considering meant the other nieces amongst whom he had divided the ten-elevenths of his residue, and made a declaration accordingly.

It may not be amiss to refer to the case of *Smith v. Osborn*, 6 House of Lord's Cases, 374, where it was decided that in a will the gift to two designated devisees as tenants in common in tail, and that if either should die without issue, then to the surviving devisee, that word must be taken to mean "other."

Opposed to this rendering of the words "survivor" or "survivors" as being "other" or "others," the counsel for the defendants refers us to the case of *Pomfort v. Graham*, 19 Ch. Div., 186.

In this case Hall, Vice Chancellor, said in the conclusion of his opinion: "I say now, looking at all the authorities and considering all the opinions expressed by the Judges, that when I have such a case as the present before me, I ought not to decide it upon the view that has been said by one Judge to be an absurdity, that the gift over to survivors for life with remainder to children is alone enough to construe "survivors" as "others."

I am of opinion that I ought to hold where that is the *sole circumstance to be relied upon*, the word must have given to it its natural and ordinary meaning, and that being so, hold that the words "survivor" or "survivors" must be so read in this case.

But is this an authority upon the question at issue? In the will before Vice Chancellor Hall, there was no gift over. There was no express provision as in the will of Richard Cooper, that it was the testator's intention to create cross remainders between his devisees and their issue.

Surely, a gift over to survivor for life with remainder to children, which seems to have been the sole circumstance for consideration by Vice Chancellor Hall, is not the sole circumstance, or any material circumstance to be considered in the construction of the will of Richard Cooper.

In the case of *Wylie v. Lockwood*, N. Y. Rep., 291, to which we have been referred there was no intention to create cross remainders by the testator, between his devisees, and no devise, over after the death of all his children without issue, or after all his descendants should become extinct as was the case in the will of Richard Cooper.

These are material differences which distinguish that case from the case before us.

But it is unnecessary to refer further to adjudged cases.

In my opinion, the intention expressed by Richard Cooper in his will to create and establish cross remainders on and in the estates, lands and premises among his several and respective children and their children lawfully begotten. So that his children, and their children should inherit so long as any of them should remain, and the expression of his will, and desire, and intention, that if the whole of his children should die, without leaving lawful child, or children, or legal descendants of such child, or children, so that the whole of the lawful issue of his own body should become extinct, and the gift, and devise of the remainder and remainders, reversion, and reversions, of his whole estate to divers persons in fee and in tail not being children, or descendants of the testator entitles the plaintiff in the Action of Ejectment as a son of Ezekiel Cooper, one of the children of the testator, to an estate in possession of one-eighth part of the lands devised to William H. Cooper another child of the testator, who died in 1847, without issue.

HOUSTON, J.

In the interpretation of a last will and testament the duty of the court is to ascertain as far as it can do so to its own satisfaction, the true meaning and intention of the testator from the words in which he has expressed it, and to give effect to that meaning and intention if practicable. And the more uncertain and obscure the meaning of it may be, the greater is the danger of resorting to mere speculation or conjecture for a correct solution of its construction. But notwithstanding the multiplicity of words and the uncertainty of meaning which characterizes the seventh item of the will in question, I can safely say that it is clear to my mind from the whole context of it, that the testator intended in the first place

to devise to each of his five children, viz.: Ezekiel, Sarah, Richard J., Ignatius T. and William H., the several portions of his real estate mentioned respectively in the second, third, fourth, fifth and sixth items of it, in severalty for life, remainder to the lawful children of each of them in tail in the portion so devised; "but in case any one or more of my said children should happen to die without leaving child or children lawfully begotten of their bodies that can take and hold my real estate, as my immediate devisees, agreeable to the intent and meaning of this my will, then in such case I give and devise the lands and premises above devised to such children which may or shall happen to die as aforesaid, unto the survivor or survivors of my said children during their natural life; and after their decease I give and devise the lands and premises, as aforesaid, to the child and children, both males and females, respectively, of such survivor or survivors, lawfully begotten of their bodies forever, of any of my children which may be dead leaving such child or children, such child or children claiming such part or share as the parent or parents of such child or children would have claimed, if living, to be equally divided between my surviving child or children, as aforesaid, and the child or children lawfully begotten of any that may be dead claiming the right of their parent or parents as if living, share and share as tenants in common, and not as joint tenants, and to the respective heirs as aforesaid forever; and it is further provided, and it is my will and desire and intention that if the whole of my children should die without leaving lawful child or children, or legal descendants of such child or children, so that the whole of the lawful issue of my own body should become extinct, then and in such case I give and devise the remainder and remainders, reversion and reversions of my whole estate in the manner and form following:"

The testator then devises over the estate to others, and then adds as follows in the eighth item of the will:

"Be it known that it is my express intention in this my will to create and establish cross-remainder on and in the aforesaid estates, lands and premises among my several and respective children and their children, lawfully begotten, so that my children and their children, as aforesaid, shall inherit so long as any of them shall remain."

And afterwards, on the 22d day of July, 1816 he executed and annexed a codicil to his will in which he subjoins the following declaration:

"I do also declare that it is my intention and will that the whole of my estate, both real and personal, shall go to and be divided to and amongst my children, and the lawful children of their respective bodies, so long as any of them shall remain; and that no other person, in remainder, shall take or inherit any part thereof so long as any of my children or their lawful issue shall survive."

I have said that upon the whole will the first intention of the testator was clear to give the lands devised in the sixth item of it in severalty and in equal portions so far as pertained to the value of them, to his five children named for the life of each of them respectively, with remainder after the death of each of them to the lawfully begotten children of each of them in fee tail general. And the next intention of the testator was equally clear, I think, that if any one or more of his said children and devisees for life under the first devise, should die without leaving child or children, lawfully begotten of their bodies, then and in such case he gave and devised the lands and premises so devised to such child or children which should happen to die as aforesaid, unto the survivor or survivors of his said children during their natural life; and this shows that none of his said children were to take even in that event by survivorship more than an estate for his life or their lives in any part of the lands and premises originally devised severally to his said children for life respectively with remainder to their children respectively in fee tail, and also that none of his grandchildren should take any interest or estate in possession in any portion of the lands and premises devised to any one of his children who should die without leaving any lawful child or children, during the lifetime of any one or more of his said children, but that the survivor or survivors of them should take such portion of the lands and premises so devised during their natural life. These intentions are all indicated and expressed with sufficient clearness and certainty in the terms of the will to be readily apprehended and undertood.

But the question is as to the next intention, and what is the

meaning of the limitation and devise over which immediately follows this in the will? It is as follows:

"And after their decease, (that is to say, of the survivor or survivors of my said children who are to take it during their natural life,) I give and devise the lands and premises, as aforesaid, to the child or children, both males and females, respectively, of such survivor or survivors, lawfully begotten of their bodies, forever, of any of my children which may be dead, leaving such child or children, such child or children claiming such part or share as the parent or parents of such child or children would have claimed, if living, to be equally dividend between my surviving child or childing, as aforesaid, and the child or children, lawfully begotten, of any that may be dead, claiming the right of their parent or parents as if living, share and share alike, as tenants in common, and not as joint tenants, and to the respective heirs, as aforesaid, forever,

I must say that I have found it impossible to give any sensible or reasonable interpretation to this devise in the will with the inherent errors apparent in the wording of it, one of which by the omission of the word *and* either destroys the grammatical structure of the sentence in which the omission occurs, or strips it of any intelligible meaning whatever, while the other omission of a few more words in another sentence of it, is so palpable as to make nothing less than nonsense of it as it now stands in the will. For I agree with the learned counsel for the plaintiff that we cannot give effect to, or in fact, any sense or meaning to the following words of the will, "and after their decease, I give and devise the land and premises, as aforesaid, to the child or children, both males and females respectively, of such survivor or survivors, lawfully begotten of their bodies forever, of any of my children which may be dead, leaving such child or children claiming such part or share as the parent or parents of such child or children would have claimed if living," without inserting the conjunction *and* between the word "forever" and the word "of" which immediately follows it in the foregoing paragraph by reason of its omission, and which with the word *and* there inserted would read, "and after their decease, I give and devise the lands and premises as aforesaid, to the child or children, both males and females respectively, of such survivor or survivors, lawfully begotten of their bodies forever,

and of any of my children which may be dead leaving such child or children, such child or children claiming such part or share as the parent or parents of such child or children would claim if living," or in other words intending to declare in case of a survivorship for life of any one or more of the portions among his children by death of any one or more of them without leaving a child, then on the death of such survivor or survivors of his said children, the child or children of such survivor or survivors of his said children and the child or children of any of his children which may then be dead leaving lawful child or children, should take the portion or portions so held for life by such survivor or survivors of his said children *per stirpes*, and not *per capita*, and in fee tail general.

There is also, as I have before remarked, evidently a similar error by the omission of intended words in the concluding part of the first and greater part of the devise which we have just before repeated, and which immediately follows it, and is separated from the preceding part of it simply by a comma, "to be equally divided between my surviving child or children as aforesaid, and the child or children lawfully begotten of any that may then be dead, claiming the right of their parent or parents, as if living, share and share alike, as tenants in common, and not as joint tenants, and to the respective heirs as aforesaid forever."

This was evidently intended by the testator to be but one continuous devise over of any portion of the lands and premises which might happen to have been devised to any one or more of his said children who should happen to die without leaving child or children lawfully begotten of their bodies, and which in that case was or were given to the survivor or survivors of his said children during their natural life, after the decease of survivor or survivors of his said children, to such of his grand-children as he wished to share in such portions of his lands and premises as might thus survive to any survivor or survivors of his said children for life, after the death of such survivor or survivors, and when, of course, all of his said children would be deceased. This was the special contingency, in case it should occur, which he was evidently providing for in this devise of the will, for notwithstanding the length of it and the multitude of words employed in it, it is one single, continuous and contingent devise of that contingent estate devised to

the survivor or survivors of his said children for life in the portion or portions devised to any one or more of them who should happen to die without leaving child or children lawfully begotten of their bodies; it was to provide for the limitation and devise over of these contingent estates for life in the survivors of his said children in case they should occur as apprehended and provided for, on the death of the last survivor of them; and to show that it was evidently intended by the testator to be one such single and continuous devise of such a life estate or life estates on the death of all his said children, it is nowhere divided by any other mark of punctuation than a comma from the commencement to the conclusion of it. But to make this part of the devise consistent with all of the preceding part of it, and even possible in the contingency contemplated by the testator, must we not also insert before the words "my surviving child or children as aforesaid," and after the word "between" in the beginning of this part of the devise the words "the child or children of?" And may we not suppose that in writing the will, or perhaps, in preparing a fair copy from the original draft of it, these words were inadvertantly omitted from it. For as the words stand in the will "to be equally divided between my surviving child or children as aforesaid, and the child or children lawfully begotten of any that may be dead," &c., it was a matter of absolute impossibility apparent upon the face of the devise itself that there could be any of his said children surviving when this devise by the very terms of it was to take effect, for it was not until "after the decease of the survivor or survivors of his said children" that this devise over of the lands and premises to any of the children who should die without leaving a child or children, was to the survivor or survivors of them for life, and it was, of course, not until after the death of the last survivor of them, if there had been more than one survivor of them when his son, William H. Cooper, died without child or children, that any of the testator's grandchildren was to share in the possession of any part of the lands and premises devised in the first place to him. It was therefore an impossible and absurd devise and wholly inconsistent with the manifest intention obvious upon the face of it, and must fail for that reason unless we give it a reasonable construction in accordance with that evident intention apparent upon the face of the devise,

and consistent with all the preceding and succeeding parts of the will, by inserting the words I have suggested in the place and connection where they were manifestly omitted contrary to the meaning and intention of the testator. With those words inserted the subsequent and concluding part of the devise in question will read as follows, and render the whole devise intelligible and consistent from the beginning to the end of it: "to be equally divided between the child or children of my surviving child or children as aforesaid, and the child or children lawfully begotten of any that may be dead, claiming the right of their parent or parents, as if living, share and share alike, as tenants in common, and not as joint tenants, and to the respective heirs as aforesaid forever." Without these presumptions to explain and rebut the obscurity and contradiction apparent on the face of devise itself as it stands, I have been wholly unable to say what meaning it possesses, or whether it in fact possesses any intelligible or practicable meaning whatever. And yet I have a strong conviction that the two corrections suggested, if made in the words of it, would make it what he intended it should be when he made the will.

His son Ignatius T. Cooper was the sole survivor of his said five children in the year 1847 when his son William H. Cooper died without issue, and this Court at the June Term, 1857, held that Ignatius T. Cooper, as such sole survivor, took under this devise on the death of his brother William H. without leaving child or children, an estate during his natural life in the portion of the lands and premises devised by the testator to his son William H., and which he held in pursuance of it, until his death in the year 1884, *Doe et Cooper v. Townsend et al.*, 1 Houst., 365. Ignatius T., was of course, the last survivor of the testator's said children, and on the death of William H. without leaving any child succeeded to the lands and premises devised to him, for the term of his life, as this Court unanimously ruled in that case; and if there be any intention to be deduced with more certainty than any other from the obscure and defective language and grammar in which the devise now before the Court is expressed, it certainly seems to me to be more in accordance with the general scope and design of the other parts of the will about which there is no dispute, to give to this

devise the intention and construction which I have herein given to it.

As I have before observed, it clearly appears from the other parts of the will that it was the desire and intention of the testator in devising his real estate to his five children, was to divide it in value equally between them, giving to each an estate for life in his or her several portion, with remainder to the children of each in tail, with the special limitation or qualification, if any one or more of his said children should die without leaving a child or children, he gave the lands so devised to such child or children to the survivor or survivors of his said children during their natural life, and under which the land so devised to his son, William H, who was the only one of the five children who died without leaving any child, on his death passed to his son Ignatius T. for life, and who was then the only survivor of his said five children; but as this was the only exception which he made in his will to his scheme and purpose to devise and divide the lands equally between them all for life with remainder in tail to the children of each respectively, subject only to this special and limited impairment of the equality of the division among his children and their children after their death, during the life time of the survivor or survivors of his said children in case of the death of any one or more of them without leaving a child. And is there any thing in the will to warrant the opinion that he intended to depart any further than this from the equality of division which he first made between them and their children respectively in the main devise in the will, or that he intended in the event which has occurred that the lands and premises which were so devised to his son William H., should on his death without leaving a child, not only accrue by survivorship to Ignatious T., then his only surviving child, for the term of his natural life, but should also accrue on the death of the latter to the exclusive benefit of the children of the latter, if their should be any child or children or descendants of either of his other five children then living?

But that it was the intention of the testator that on the death of his last surviving child, Ignatius T., the lands which had survived to him for the term of his life on the death of his son William H. without leaving a child, should be equally divided between

all the children of his said children then living, *per stirpes*, share and share alike, as tenants in common, and not as joint tenants, and their respective heirs forever, is rendered still more certain and conclusive by the declaration made by him in the eighth item of it, as follows: "Be it known that it is my express intention in this my will to create and establish cross remainders on and in the aforesaid estates, lands and premises among my several and respective children, and their children lawfully begotten, so that my children and their children, as aforesaid, shall inherit so long as any of them shall remain." And such was the importance which he attached to the express intention therein declared that he was not content with so expressing it once only, but afterwards substantially repeats it in equally explicit and positive terms in the codicil executed on the 22d day of July, 1816, and appended to the will, as follows: "I do also declare that it is my intention and will that the whole of my estate, both real and personal, shall go to and be divided to and amongst my children and the lawful issue of their respective bodies, so long as any of them shall remain; and that no other person in remainder shall take or inherit any part thereof, so long as any of my children or their lawful issue shall survive."

One might even suppose that the eighth item of the will in which the testator so particularly and forcibly declares his express intention to create and establish in his will cross-remainders in the aforesaid estates, lands and premises among his several and respective children, and their children lawfully begotten, so that his children and their children should succeed to the title and possession of them under the devises of the will so long as any of them should be in existence, was directly suggested by the ruling of the Court of King's Bench in the case of *Doe v. Wainwright*, 5 T. R., 427, in a case of cross remainders somewhat similar to that in this case.

Anthony Reybold *v.* George A. Parker, et al.

Joint Contract—Absent Defendant—Statute of Limitations.

The contract not in writing being joint and not joint and several, the cause of action was joint and not joint and several and all the parties liable must be declared against jointly.

The plaintiff, having brought suit against all the persons liable on a joint contract, part only them having been served with process and a return of *non est* as to the others, may declare against those upon whom process has been served and recover judgment against them only. By such judgment the plaintiff's cause of action against the other joint contractors will be merged and forever barred.

In an action against several joint contractors, one of the defendants having been absent from the State at the time of the accruing of the cause of action, will prevent the Statute of Limitations from running in favor of the co-defendants, remaining within the State, until his return into the State in such manner that, by reasonable diligence, he may be served with process.

(*June 27, 1887.*)

Error to the Superior Court, New Castle County.

This was an *action of *assumpsit* in the Superior Court for New Castle county, to the November Term, 1875, at the suit of Anthony Reybold *v.* George A. Parker, Samuel M. Felton, Samuel Harlan, Jr., and Jesse Lane. The summons was issued November 9, 1875, and was returned "Summoned personally, November 22, 1875." All of the said defendants appeared by their attorneys.

The amended declaration, filed August 1, 1882, suggests that since the issuing of the summons in this cause the said defendant Lane had died, and complains against the surviving defendants, Parker, Felton and Harlan. The declaration contains only the common counts, and is upon joint promises by the original four defendants.

The said surviving defendants plead *non assumpsit*, payment, set-off, and act of limitations. Issue was joined on all of said pleas except the fourth—the statute of limitations—as to which the plaintiff filed a special replication in substance as follows: That the causes of action in the declaration mentioned accrued against the said (surviving) defendants and the said Lane, now deceased, jointly; that the said defendant, Parker, before and at the time when the causes of action in the declaration mentioned accrued, was

* For decision in Court below, see 6 Houston, 544.

out of this State, and that he afterwards, to wit, on January 1, 1875, came into this State, which said coming was his first coming into this State after the accruing of said causes of action in such manner that by reasonable diligence he could have been served with process—and that the plaintiff commenced his said action against the said defendants within three years after the said Parker's said coming into this State.

To this replication the defendants demurred, assigning the following causes of demurrer:

"1. That the said replication sets forth that one only of the said co-defendants was absent and out of the State at and before the accruing of the said causes of action to the said plaintiff, which fact, if true, would not bring the plaintiff in the case within the saving of the statute of limitations in such case made and provided.

"2. That the said replication and the facts therein stated only relate to one of the said co-defendants, and state no sufficient reason why the statute of limitations has not barred the said action as to the other defendants.

"And also that the said replication is in other respects uncertain, informal, and insufficient, etc."

Thereupon the plaintiff filed his joinder in demurrer.

On September 24, 1883, the plaintiff suggested upon the record the death of the said defendant Harlan, and that he prosecutes his said action against the said Parker and Felton, the surviving defendants.

On the same day, after hearing, judgment on the said demurrer was rendered against the said plaintiff as follows: That the said replication of the plaintiff and the matters therein contained are not sufficient in law for the said plaintiff to have and maintain his aforesaid action against the said defendants, etc.

For the reversal of said judgment this writ of error was taken by the plaintiff, against the said surviving defendants, Parker and Felton.

The plaintiff filed the following Assignments of Error and prayer for reversal.

"1. That the Court below erred in deciding that the replication of the plaintiff, stated in the record to have been pleaded to the fourth plea of the defendants and the matters therein contained,

were not sufficient, for the said plaintff to have and maintain his said action thereof against the said defendants, and that, therefore, the said plaintiff should take nothing by his writ'; whereas on the contrary thereof this plaintiff insists that the said replication and matters therein contained were sufficient in law in that behalf, and that the judgment of the Court below should have been for the plaintiff.

"2. That the Court below erred in sustaining the demurrer of the defendants to the replication of the plaintiff to the said fourth plea of the defendants, and in rendering judgment thereon for the defendants, whereas this plaintiff insists that the said demurrer of the defendants should have been overruled, and that judgment thereon should have been rendered for the plaintiff.

"3. That the judgment of the Court below on the said demurrer should have been for the plaintiff and not for the defendants. Wherefore the said plaintiff prays that the judgment of the Court below may be reversed."

Edward G. Bradford and *Nathaniel B. Smithers*, for the plaintiff.

The question is whether, in a suit against several joint debtors, where more than the statutory period of limitation has elapsed between the accruing of the cause of action and the bringing of suit, but where one of such debtors was out of the State when the cause of action accrued, and did not come into the State until within the statutory period next before the bringing of suit, the plaintiff, notwithstanding a joint plea of the statute, is not entitled to recover judgment against all the debtors sued.

Its proper solution depends upon the construction to be given to our statute in that behalf

"No action of assumpsit * * * shall be brought after the expiration of three years from the accruing of the cause of such action."—*Del. Rev. Code*, 728, Sec. 6.

"If at the time when a cause of action accrues against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into the State, in such manner that, by reasonable diligence, he may be served with process."—*Del. Rev. Code*, 730, Sec. 14.

Upon due consideration, it will be found:

(1) That the express terms of the statute support the position of the plaintiff.

(2) That the reason of the case is on his side.

(3.) That the authorities are overwhelmingly in his favor.

The statute provides that "if at the time when a *cause of action* accrues against *any person*, he shall be out of the State, THE ACTION may be commenced," etc.

A cause of action that accrues against several persons *jointly* accrues against *each* of them.

A cause of action that has accrued against *A and B*, can with perfect legal propriety be said to have accrued against *B*.

If a plaintiff in an action on a promissory note declare against *A*, *B* and *C*, and at the trial produce a note executed by only *A* and *B*, he will be *nonsuited*.

But, if a plaintiff, in a similar action, declare against *A* and *B*, and at the trial produce a note executed by *A*, *B* and *C*, he will be entitled to recover.

In the first case, the plaintiff will fail, because there is a *variance;* which is "a disagreement in some particular point or point or points *between the allegation and the evidence.*"

*Stephen on Pl.** 85.

In the latter case the plaintiff will succeed, because there is *no disagreement* between the allegation and the evidence.

Hence, in case of a *misjoinder* of parties defendant, the plaintiff will fail at the trial or on demurrer.

1 *Chitty on Pl.** 44.

But, in case of a *non joinder* of parties defendant, a plea in abatement must be interposed, or the plaintiff will recover.

1 *Chitty on Pl.** 46; *Andrews v. Allen, et. al.*, 4 Harr., 452; *Barry v. Foyles*, 1 Pet.* 311; *Wright v. Hunter*, 1 East. 20; *Rees v. Abbott*, Cowper, 832; *Mountstephen v. Brooke*, 1 B. & Ald*., 224; *Richards v. Heather*, 1 B. & Ald.,* 29; *Rice v. Shute*, 5 Burrow, 2611, 2 Wm. Blackst, 695; *Abbott v. Smith*, 2 Wm. Blackst,* 947; *Cabell v. Vaughn*, 1 Wm. Saunders, 291.

A suit against several joint debtors, one of whom has come into the State within the statutory period next before suit brought

is embraced within the saving of the statute, when its express terms are considered in their proper legal sense.

The statutory saving, *construed literally and sensibly*, prevents the running of the statute in favor of any of several joint debtors, so long as one of them, who was out of the State, when the cause of accrued remains out of the State.

The statute provides that, within the statutory period after his coming into the State, "THE ACTION may be commenced."

The statute, at least in terms, nowhere limits the plaintiff to *an action* against the *joint debtor so coming into the State.*

The statute gives the plaintiff the right to commence THE ACTION.

Now, the *cause of action*, in the case discussed, is against *all the debtors jointly.*

When, therefore, the statute provides that "*the action* may be commenced," its language clearly points to the commencement of an action *against all the debtors jointly.*

Otherwise, without any words to warrant it, the word *action* as first occurring would possess a different significance from that of the same word as subsequently occurring in the same clause of the same sentence.

There is only one cause of action mentioned in the section; there is only one action mentioned there.

But it is only reasonable that courts of justice, in dealing with such a law, should, in a legitimate mode, gather its *general intention and controlling purpose*, and presume that the legislature intended that the law, in its application to special cases, which *may not* actually have been present to the mind of the legislature at the time of its enactment, should, so far as its language will fairly permit, be so construed as to *carry into effect and not defeat*, such intention and purpose.

The *general intention* and *controlling purpose* of the statutory saving in question was that the plaintiff should not be barred by the statutory limitation, where, owing to absence from the State *on the other side*, he cannot have *the benefit and the full benefit* of his action.

The plaintiff should not be damnified by the statutory limi-

tation in case of such absence, *whether the only debtor, or all the debtors, or any one or more of the debtors should be so absent.*

The plaintiff should have his *full right* of action.

"The action" might be commenced upon the "cause of action;" whether that cause accrued against only one debtor, or several jointly.

The statute of limitations is for the protection of the defendant, for he can waive its benefit.

The statutory saving is for the protection of the plaintiff, and is intended, *not* for his *partial*, but for his full protection.

In *Byrton v. Waples*, 3 Harr. 75, it was held that the plea of the statute is not a defence going to the real merits, such as will be favored in granting leave to amend pleadings.

The policy of the statute is *not* to *defeat* the plaintiff in whole or in part, with respect to his action *until after* a period has elapsed, during which he has had *full power* to *fully* enforce his rights of action.

The statutes of limitation serve to EXEMPT the defendant from liability *only* after the plaintiff has had during a certain period *full* power of enforcing that liability.

If *public policy* will permit, as it unquestionably will, an action to be maintained against the joint debtor so coming into the State, it will equally permit the action to be maintained as against all. It was the intention of the legislature that the plaintiff should have the statutory period for the enforcement of his *full right* of action, and that, in a case like the present he should have that right after the joint debtor, who was absent, comes within the State.

If the demurrer in this case can be sustained, it must be because:

(1) The case of joint debtors, one of whom is out of the State, is not within the statutory saving: or

(2) The statutory saving was intended to preserve the action only against the joint debtor coming into the State.

The result of such a construction would be to compel a plaintiff, within the period of limitation, to bring his action against *all* the joint debtors, have a return of *non est inventus* as to the absent joint debtor, and take judgment against the others.

The pecuniary ability and character of the absent joint debtor

might have have been the sole inducement which led the plaintiff to trust and contract with them jointly. He might thus be left with a judgment against worthless debtors as the only means of satisfying his claim. Such a result is plainly forbidden by the policy of the statutes of limitation, which intend that no plaintiff, who has a claim against several joint debtors shall be barred until after the lapse of a certain period, during which he can, through suit, enforce that claim against all of them.

The plaintiff, although having a claim against several debtors *jointly*, would have to *choose* between waiting for the coming of the absent joint debtor, and then bringing suit, after the statutory period had run out in favor of the resident joint debtors, on the one hand, and, on the other, suing within the statutory period and recovering judgment against the resident joint debtors.

If he should adopt the latter alternative, he would have to bring suit against *all* the joint debtors, have a return of *non est* as to the absent joint debtor, and take judgment, *perhaps a worthless judgment*, against the others. After his recovery of such judgment, his remedy against the absent joint debtor, even upon his coming into the State, would be gone. For a judgment recovered against *one* of several *joint* debtors is a *bar* to an action against the others.

King v. Hoare, 13 M. & W., *494; *Robertson v. Smith*, 18 Johns, *459; *Ward v. Johnson*, 13 Mass., 148; *Gibbs v. Bryant*, 1 Pick., 118; *Trafton v. United States*, 3 Story, 646; *Mason v. Eldred et. al.*, 6 Wall., 231; *Addison on Contracts*, *1197; *Smith et. al. v. Black*, 9 Serg. & R., 142.

But suppose the plaintiff should adopt the former of the two alternatives, and bring suit after the absent joint debtor comes into the State, and after the statutory period has completely run in favor of the resident joint debtors. In such case he would have to bring suit, *either* against the newly arrived joint debtor *alone*, or against *all* the joint debtors. But if he brought suit only against *the newly arrived joint debtor* he would be met with a plea in abatement for the *non joinder* of the other joint debtors, and would be defeated. For the other joint debtors might, if joined in the suit, *waive* the benefit of the statutory bar, and, should they omit to plead the statute, would waive it.

State, use of Parker v. Whitaker, 4 Harr. 527.

The undertaking of co-promisors then, is a liability or undertaking, which in its very nature continues so long as the original liability continues on the part of any one, for the payment of the debt; for so long as the liability of any one continues, he may be compelled to pay, and when he pays he is entitled to recover contribution."

Peaslee v. Breed, 10 N. H., 489; *Boardman v. Paige*, 11 N. H., 431.

After a return of *non est inventus* as to one joint debtor, the plaintiff will be compelled to proceed with due diligence against the others. And, as has already appeared, by recovering judgment against them, he will be barred as to the absent joint debtor.

Under the statute of Anne, if a right of action accrue against several persons jointly, one of whom is beyond seas, the statute of limitations does not run till his return, though the others have never been absent from the kingdom. *Fannin v. Anderson*, 7 Ad. & Ell. N. S., *811; *Towns v. Mead*, 16 Com. B., *123.

But the law in England, as settled by the above decisions, has been changed by statutory enactment.

The statute of Victoria furnishes a clear recognition and practical illustration of the broad policy of the statutes of limitation, that a plaintiff, having a claim against two or more debtors, shall have *a certain period* within which to enforce the liability of each and all of them.

The decisions reached in *Fannin v. Anderson* and *Towns v. Mead*, at a time when the recovery of judgment against the resident joint debtors would destroy the plaintiffs right of action as against the absent joint debtor, were not only in harmony with, but required by the sound legislative policy which is to be gathered from the provisions of the statute of Victoria.

But in Delaware, as in England at the time *Fannin v. Anderson* and *Towns v. Mead* were decided, there is no statute similar to that of Victoria. These English cases are, therefore, high authority in favor of the plaintiff's position. They, of course, are not *per se* conclusive, but they are entitled to great weight before this Court. They were *unanimous* decisions by judges of eminent ability.

The return of one of two joint debtors into the State, after the right of action had accrued against both, and his subsequent death, would not bar an action against the survivor, who did not come into the State until within six years next before the bringing of suit against him.

Didier v. Davidson, 2 Barb. Ch., 477.

And after a full argument, and taking time for consideration the Court decided that where one of the joint debtors was out of the realm when the cause of action accrued, although the others were within the jurisdiction of the Court at that time, he could not set up the statute of limitations as a bar; where the suit was commenced within six years after his return from abroad. And such I have no doubt is the reasonable and proper construction of our statute on that subject.

With respect to *Didier v. Davidson*, it is material to observe.

(1) That the Chancellor had arrived at "a very strong and decided opinion" in favor of the construction contended for by the plaintiff in this case before *Fannin v. Anderson* had been decided. *Didier v. Davidson* and *Fannin v. Anderson* were therefore, two concurrent, but wholly independent, decisions by able Courts upon similar statutory enactments.

(2) That the Chancellor does not anywhere intimate that the construction he gave to the statutory saving violated *either its terms or its policy.*

The absence of one joint debtor from the State suspended the running of the statute of limitations as to him, although his co-debtor had remained within the State.

Denny v. Smith, 18 N. Y., 567; *Cutler v. Wright*, 22 N. Y., 472; *Town v. Washburn et al.*, 14 Minn., 268.

Examination of the cases relied upon by the counsel for the defendants clearly shows.

(1) That these decisions rested mainly upon the existence of statutory enactments, by which the recovery of judgment against the resident joint debtor would not bar the plaintiff's remedy against the absent joint debtor.

(2) That both *Brown v. Delafield* and *Bruce et al. v. Flagg et al.*, recognize that a plaintiff should have full remedy against all

of several joint debtors, notwithstanding the non-residence of some of them.

It is true that, in the American cases in favor of the plaintiff, the ruling was limited in extent to the necessities of the decision upon the existing facts of those cases, and merely *decided* that the plaintiff's right of action was preserved as against the absent joint debtor, although the period of limitation had expired after the accruing of the cause of action.

But these cases recognize that it was the manifest intention of the leglislature in enacting the statutory saving that *every one of several joint debtors should be liable to civil process during a certain period.*

And there can no reason to doubt that, in the absence of any statute permitting the recovery of judgment against the absent joint debtors after a former judgment recovered against the resident joint debtors, the Courts in New York and Minnesota would in a case like the present enforce to its full extent the doctrine of the English cases, and hold that the plaintiff's action was preserved as against *all* the joint debtors during the period of limitation after the return of the absent joint debtor.

If the terms of the statutory saving require that the action shall be preserved as against the absent joint debtor, they at least equally require that the action should be preserved as against all of the joint debtors.

George Gray and *W. C. Spruance*, for defendants.

The defendants plead "*In nullo est erratum.*"

As appears by the pleadings the causes of action in this suit are joint, and not joint and several, and the question now presented to the Court is whether the act of limitations begins to run against a joint contract until a co-contractor, who was out of the State when the cause of action accrued, comes into the State in such manner that by reasonable diligence he may be served with process. The provisions of our statutes of limitations bearing upon the subject are as follows :

"No action of assumpsit * * * shall be brought after the expiration of three years from the accruing of the cause of such action," etc.

Revised Code (1852), 440, Sec. 6; *Revised Code* (1874), 728, Sec. 6.

"SECTION 14. If at the time when a cause of action accrues against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into the State in such manner that, by reasonable diligence, he may be served with process; and if after a cause of action shall have accrued against any person, he shall depart from and reside out of the State, the time of his absence until he shall have returned into the State in manner aforesaid, shall not be taken as any part of the time limited for the commencement of the action."

R. C. (1852), 441; *R. C.* (1874), 730.

The first general statute of limitations in England, was 21 James I., ch. 16 (1623.) It contained a saving of the rights of plaintiffs beyond seas when the cause of action accrued, § 7, but no saving as to absent defendants.

Wood on Limitations, 633.

This statute remained in force until the statute of 4 Anne., ch. 16 (1705) which contained a similar saving of the rights of plaintiffs beyond seas, § 18, and also the following saving as to absent defendants, § 19—"if *any person or persons, against whom* there is, or shall be, any such cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, action *sur trover*, or replevin, for taking away goods or cattle, or of action of account, or upon the case, or of debt grounded upon any lending or contract, without specialy, of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment, *or any of them*, be, or shall be, at the time of any such cause, or suit, or action given or accrued, fallen, or come, beyond the seas, then such person or persons, who is, or shall be entitled to any such suit, or action, shall be at liberty to bring the said actions against such *person or persons* after their return from beyond the seas, so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions, before by this Act and by the said other

Act made, in the one and twentieth of the reign of King James the First."

Wood on Limitations, 633.

Neither of these statutes was ever in force in this State, so far as is known.

Our first colonial act for the limitation of actions was that of 15 Geo. II (1741.) This act contains a saving of the rights of absent plaintiffs, and also the following saving clause as to absent defendants:

"SECTION 6. And if any person or persons, against whom any of the causes of action beforementioned do arise, shall, at the time of the cause of suit or action arising, or afterwards, before the time of bringing such actions be expired, be beyond seas, or go out of this government, then the person entitled to such suit, may bring an action after the return of such person, so as he bring the same within such time after the return as is before limited by this act."

1 Delaware Laws, 231.

The supplement to this act, passed April 12, 1773, retained the provisions saving the rights of absent plaintiffs, and re-enacted said Section 6 in the same language, excepting that the action was required to be brought "within three years after the return."

1 *Delaware Laws*, 527.

The additional supplement to said act, passed February 4, 1792, contains a saving of the rights of absent plaintiffs, and the following saving clause as to absent defendants:

"And if any person or persons, against whom any of the causes of actions hereinbefore mentioned do arise, shall at the time of the cause of suit or actions arising, or afterwards before the time of bringing such action or suit be expired, be beyond sea, or out of this State, then the person entitled to such suits may bring an action after the return of such persons, so as he bring the same within three years next after their return."

2 *Delaware Laws*, 1032.

The act of February 2, 1811, Sec. 22, after reciting the act of 1792 and sundry other former acts, saving from the operation of the statutes of limitations the rights of absent plaintiffs—and reciting that the courts of this State, and of the United States,

held in this State, are open to all persons equally, whether they reside in this State or out of it, and that the saving allowed to persons beyond sea or out of the State is injurious to the inhabitants of the State—repeals every provision of said recited acts which saves or gives to persons beyond sea or out of this State the right of bringing action for the time limited in said acts after their return from beyond sea or returning to or being in this State; and expressly declares that all persons beyond sea or out of the State shall bring their actions within the same times as are limited in said recited acts for persons to whom no saving is given, and not after.

4 *Delaware Laws*, 457 to 460.

Our next act upon the subject was that of January 30, 1829, in which the saving clause as to absent defendants is as follows:

SECTION 9. *Provided*, That *when a cause of action arises in this State*, if the person liable to such action be not an inhabitant of this State at the accruing of such cause, or abscond or remove from this State before the expiration of the time allowed by this Act for bringing such action, the time during which such person shall have been out of this State, shall, in applying either of the limitations in this Act, be deducted, and in every such case at least one year from the return of such persons into this State, shall be allowed for bringing such action."

7 *Delaware Laws*, 269; *Hall's Digest*, 398.

This provision remained in force until its repeal by the Revised Code of 1852, which substitued Sec. 14, page 441, above recited.

Said Section 9 of the act of 1829 differed from all former acts in several important particulars: it contained no saving of the rights of absent plaintiffs; it confined the saving as to defendants to cases where the "cause of action arises in this State," it substituted the words "not an inhabitant of this State" and "abscond or remove from this State," for the words "beyond seas" or "out of this government" or "out of this State," as used in former statutes.

The most important change was the omission of the words "or persons." All former acts had provided that "if any *person or persons*, against whom, etc."; but this act uses the strikingly limited language "if *the person* liable to such action," etc.

It is reasonable to conclude that this change was intended for a purpose, viz.: To confine the operation of the saving to the case of the absence of a single contractor in case there was but one, or the absence of one of them in case of a several contract, so far as affected his liability, or to the absence of all of the contractors in the case of a joint contract.

The language of Section 14 of Chapter 123 of the Code of 1852, which is now in force, is equally limited: "Any person"—"such person," are the terms of description used, and we submit they are as significant, and effect the same result as the similar terms in the Act of 1829.

While the word "person" should not be so strictly construed as to be confined to a sole contractor, and may be properly read "persons," when applied to several contractors, it would be doing violence to the language of the statute to interpolate after the word "person," the words "or persons or any of them," as must be done to reach the result claimed by the plaintiff.

Section 7 of the said Statute of James (passed in 1623) provided "That if *any person or persons* that is or shall be entitled to any such action of trespass, etc., be, or shall be at the time of any such cause of action given or accrued * * * beyond the seas, that then *such person or persons* shall be at liberty to bring the same action, so as they bring the same within such times as are before limited after their * * return from beyond seas," etc.

The first judicial construction of this section was in 1792, in the case of *Perry v. Jackson*, 4 Term, 516. The action was on a bill of exchange by the payees against the drawers. The defendants pleaded the statute of limitations. To which the plaintiffs replied that when the cause of action accrued one of them was beyond seas, and that he remained there continually from thence until 1787, and that their suit was brought within six years after his return.

Lord Kenyon, after quoting the above provision of the statute, says: "Now the words of this clause, grammatically speaking, do not apply to the present case; they only extend to cases where the person individually—a single plaintiff, or persons in the plural, when there are several plaintiffs, are not in a situation to protect their interests. Neither does this case come within the policy of

the law, which provides that, if parties neglect their interests for such a length of time as six years, they shall lose the benefit of suing to enforce their demands. I am, therefore, clearly of the opinion, both on the words of the Act of Parliament, and on grounds of policy, that the plaintiffs are barred by the statute of James."

Ashhurst, J., concurs on both grounds. "The plaintiffs do not come within the words of the proviso. * * *and this statute having been always considered as a beneficial law for the public, we ought not to extend the exceptions in it to a case which does not require it.".

A marked difference between the statute of Anne and the Delaware Statutes of limitations, is that none of the latter contain the words "or any of them."

The first judicial construction of Section 19 of the Statute of Anne (1705) saving the rights of plaintiffs as to absent defendants was in 1845—140 years after the passage of said act—in the case *Fannin v. Anderson*, 7 Q. B., 811 (53 Eng. C. L.)

Lord Denman, C. J., delivering the judgment of the Court, held that the words "or any of them" in the statute of Anne refer to the actions and not to the persons, and that the action was not barred against the defendant.

In the present case the protection of the statute is asked, not merely by the defendant who was absent, but by the other defendants who, so far as appears, were always residents of this State and never absent therefrom.

The next and only subsequent case under this provision of the statute of Anne was *Towns v. Mead*, 16 C. B., 123 (81 Eng. C. L.) in 1855.

The defendant demurred to the replication to the plea of the statute of limitations.

In the argument for the plaintiff it was, among other things, contended that he was entitled to judgment upon the plain words of the statute; and that unless the words "or any of them" in the 19th Section of the Statute of Anne apply to the "person or persons," they have no application at all (page 131–2.)

The court overruled the demurred and gave judgment for the plaintiff.

The settled practice in this State in suits upon joint contracts against several defendants is to return *non est* as to the absent defendants, and declare and proceed to judgment against those who have been served with the process.

By our practice a judgment can thus be obtained against those of the contractors who are within the reach of process without delay and with little expense.

So far as appears from the pleadings, three of the four contractors in this case, viz.: Samuel Harlan, Jr., Jesse Lane and Samuel M. Felton, were in this State and subject to its process during the whole period of three years next after the accruing of the cause of action, and it was therefore in the power of the plaintiff, at any time within said three years, to have brought his suit against all four of said contractors, and (if he had a just demand) obtain judgment for his whole demand against the three named.

It is to be observed, as before stated, that these statutes are now universally recognized as highly beneficial, and as resting on principles of sound public policy, "and as not to be evaded except by methods provided therein." *Wood on Limitations*, 5; *Blanchard on Limitations*, 3; *Wilkinson on Limitations*, 12, 13; so that there is no doctrine of construction applicable to these statutes, by which Courts will permit themselves to seek an avoidance of their prohibition, much less to disregard the plain terms in which the legislative will is expressed.

The saving of the 14th Section is as follows, "If, at the time when a cause of action accrues against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into the State, etc."

The terms of the saving do not include the joint contractors *who are in the State*, and against whom this very cause of action has accrued. They (the three original defendants in the case) were confessedly within, and "not out of," the State when the alleged cause of action accrued, and for the whole period of three years thereafter, and were therefore within the protection of 6th Section of the statute.

The language of the two sections taken together as they must be (the 6th and 14th), as certainly protects from an action of assumpsit, persons who are *not out of the State* when the action

accrues, as they save the action against those who *are* out of the State when it accrues, and it is submitted that it would be an entirely unreasonable, in fact judicial legislation of the plainest kind, to take away the protection of the statute in a case plainly covered by its words, in order to include in its saving a case that has been manifestly omitted by the law-making power. The counsel of the plaintiff, in his brief below, in effect admits that the framers of the saving clause did not have in mind the case of the absence of one of several joint contractors.

Here then, it is submitted, is a saving from the operation of the statute of limitations, made by the Legislature, which, in plain terms, subject to the *statutory* rule of construction above referred to, applies only to cases where the *sole* contractor, or if there be more than one and they are joint, *all* the contractors, are absent from the State.

No legislature has ever *in terms* made a law so monstrous as to provide that joint debtors or contractors living in the State, always ready to respond to their liability, should be deprived of the protection of the statute, and compelled to live all their lives with a liability to be sued by their next door neighbor impending over them while they see the testimony with which they could meet the demand disappearing year by year, but powerless to bring the contention of their adversary to the arbitrament of a legal tribunal, because one of their alleged joint debtors or contractors remains out of the State.

No court in this country or in England has ever in the case actually before it held *an always resident joint debtor* liable after the period of limitation had expired, by reason of the absence from the country of the other joint debtor.

Didier v. Davidson, 2 Barb., Ch. 447; *Brown v. Delafield*, 1 Denio, 445; *Denny v. Smith and Hull*, 18 New York, 567; *Bruce v. Flagg and Price*, 1 Dutcher, (N. J. L.), 219, (in 1855.); *Wood on Limitations*, 698.

The cases upon this point being few, there is naturally little to cite from text books. But it is significant as showing the inclination of the legal mind against the monstrous construction contended for by plaintiff's counsel in this case, that in the short paragraph

devoted by Wood, in his work on limitations, to this subject, he says:

"Where there are two or more joint debtors, one of whom is absent, the statute does not run in favor of the absent debtor, although it has run in favor of the others; nor, upon the other hand does the circumstance that one of the joint debtors is absent from the State prevent the statute from running in favor of the others."

Wood on Limitations, Secton 246.

SAULSBURY, CHANCELLOR:

Anthony Reybold caused a summons in an action of assumpsit to be issued against George A. Parker, Samuel M. Felton, Samuel Harlan, Jr., and Jesse Lane on the 9th day of November, 1875, which summons was returned, "Summoned personally, November 22, 1875."

All the defendants appeared by their attorneys.

The declaration was upon joint promises by the original four defendants.

Among the pleas pleaded, was the statute of limitations.

To this plea the plaintiff filed a replication as follows, "And the said plaintiff, as to the said plea of the Act of Limitations by the said defendants jointly above pleaded saith that the said plaintiff by reason of anything by the said defendants, in that plea alleged, ought to be barred from having and maintaining his aforesaid action thereof against the said defendants: because he saith that the several causes of action in the said declaration mentioned, accrued against the said defendants and the said Jesse Lane, now deceased, jointly: that the said defendant George A. Parker, before and at the time when the several causes of action in the said declaration mentioned, and each and every one of them accrued to the said plaintiff, was out of the State of Delaware, to wit: at a place unknown to the said plaintiff: and that the said defendant George A. Parker, afterward, to wit: on the first day of January in the year of our Lord one thousand eight hundred and seventy-five, came from without said State into said State; which said coming of the said defendant was his first coming from without said State into said State after the accruing of the said several causes of action, and each and every one of them, in such manner,

that by reasonable diligence the said defendant, George A. Parker, could have been served with process.

And the said plaintiff further saith, that the said plaintiff commenced his said action against the said defendants, within three years after the said defendant George A. Parker's said coming into said State, and this the said plaintiff is ready to verify. Wherefore he prays judgment," etc.

To this replication the defendants below demurred, and judgment in their favor on the demurrer, was rendered by the Court below.

The question therefore before us under this Writ of Error to the judgment thus rendered, is whether in a suit against several joint debtors, where more than the statutory period of limitations has elapsed between the accruing of the cause of action and the bringing of suit where one of such debtors was out of the State, when the cause of action accrued and did not come into the State until within the statutory period next before the bringing of suit, the plaintiff notwithstanding the joint plea of the statute is not entitled to recover judgment against all the debtors sued?

Can a plaintiff in a suit against all the joint debtors, recover judgment therein against all of them, there being four, notwithstanding three of them have never been out of the State, but always resident therein, and but one of them without the State, at the time of the accruing of the cause of action, but returned into the State within the statutory period next before the bringing of suit?

The provision of our statute in respect to limitations is: "If at the time when a cause of action accrues against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into the State in such manner that by reasonable dilligence he may be served with process."

Assumpsit was the form of action in the Court below.

Samuel M. Felton, Samuel Harlan, Jr., and Jesse Lane were resident in the State at the time of the accruing of the cause of action.

Parker, the other joint contractor, and one of the defendants

was without the State, and continued without it until within three years of bringing the suit.

The contract being joint, and not joint and several, the cause of action was joint and not joint and several.

Reybold, the plaintiff in any suit he might bring on the joint contract was necessarily compelled to make the other joint contractors defendants therein; because if any of the joint contractors liable as defendants was omitted to be made such in the writ, those who were sued might avail themselves of this fact by a plea in abatement, it being the established law, as remarked by Lord Kenyon, Ch. J., in *Shepperd against Bailee*, "That the plaintiff must sue all the parties to the contract on which he brings his action," 6 Term, 329.

It is true that according to the usual practice in the Law Court in this State a plaintiff having brought a suit against all the persons liable upon a joint contract, and part only of them having been served with process and a return of *non est* made as to such as have not been served with process, may, if he chooses so to do, declare against those only upon whom process has been served, stating the return as to the others, and in such suit may recover judgment against those only upon whom process has been served, and who have appeared.

But what is the effect, of so proceeding?

The plaintiff can recover no judgment against any of the co-contractors not served with process and not declared against, but any judgment which he may recover in said suit against these served with process, and declared against will merge any right of action or right of demand against each and every co-contractor not served with process, and not declared against.

They will not be parties to any such judgment, and his right of action against such will be forever gone.

But is the plaintiff bound to pursue this course at his peril?

The judgment which he may recover in such suit may, or may not be wholly worthless.

He is bound to sue all who are liable to him, as joint contractors on the contract, and has a right to judgment against all if a right of judgment against any.

I do not think it can be seriously contended by any one that

had the plaintiff below sued Parker alone within three years after his return into this State judgment could have been rendered in favor of the plaintiff.

Parker could have pleaded in abatement the non-joinder of his co-contractors, and thus have defeated the suit.

If the plaintiff should have recovered judgment previously against Felton, Harlan and Lane, who had never been without the State, Parker could have pleaded that in bar in the suit against him severally, and thus have defeated the action, because the judgment against them would in law have merged the cause of action against him.

In the case of *Fannin v. Anderson*, 53 E. C. L., 811, it was decided that if a right of action accrue against several persons, one of which is beyond seas, the statute of limitations does not run till his return, though the others have never been absent."

This decision, it is true, was made under Statute 4, Anne C., 16, S. 19. But the principal rule must, I think, prevail in this case.

Lord Denman delivering the judgment in this case says: "The plaintiff cannot bring the absent defendants into court by any act of his, and therefor if he be compelled to sue those who are within the seas within six years without joining those who are absent, he may possibly recover against insolvent persons and lose his remedy against the solvent ones who are absent.

On the other hand, if he sues out a writ against all, and either continues it, without declaring, or proceeds to outlawry against the absent parties, and declares against those who are within seas, he is placed precisely in the same situation as if the statute of Anne had never passed, and obliged to incur fruitless expense, the avoiding of which seems to have been the object of this statute of Anne. That statute he says, "cannot have been passed in order to keep the plaintiffs remedy alive: for such object was easily obtained before the statute by suing out a writ and continuing it."

We think that the statute intended to render such a form unnecessary wherever by the reason of the absence beyond seas of any of the intended defendants, the plaintiff cannot have his *complete remedy* against all those who he is bound to sue, and whom he

would indeed be bound under risk of a plea in abatement to sue, if they were within the jurisdiction of the Courts of England.

By Sec. 8, Chap. 42 of the 3 and 4 of William IV, it was provided that "no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it be stated in such plea, that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit, verifying such plea.

We have no such provision of law in this State. Here, a simple plea in abatement of the non-joinder of a co-contractor verified by affidavit would be sufficient without stating that such co-joined contractor is a resident within the jurisdiction of the Court.

The case of *Fannin v. Adderson* decided in 1845 was followed by *Towns et al. v. Meade* in which it was decided that under 4 Anne C. 16, S. 19. If a right of action accrue against several persons, one of whom is beyond seas, the statute of limitations does not run until his return or death, though the others have never been absent.

In this case Jervis, C. J., remarked, "That at the time of the passing of the statute of Anne it was well known that you could not *effectually sue* one of several joint contractors without joining the others."

The bare giving liberty to sue one who is abroad at the time the cause of action arises within six years after his return from abroad while it relieves you from the necessity of suing the absent party, indirectly takes away the operation of the statute of James, because you cannot give leave to a plaintiff to sue one of several joint contractors on his return from abroad unless you suspend the remedy against all at the same time; and if so the statute never runs at all.

The counsel for the defendants reminds us that the mode in which the English Parliament dealt with this subject shortly after the case of *Towns v. Meade*, demonstrates very clearly the opinion that that legislative body entertained of the policy and justice of the ruling in that case.

What did the Parliament of England do? They did not declare that the law had been wrongly decided, but they passed an

Act changing the law as it existed at the time *Town v. Meade* was decided, and this change appears 11 Sec., 19 and 20, Victoria, C., 7.

But those provisions have no existence in the State of Delaware, nor do similar provisions of law exist here.

It is believed that where decisions exist in the several American States differing from the principles decided in *Town v. Mead* and *Fannin v. Anderson*, those decisions have been made upon statutes passed since those decisions; but no similar statutes have been passed in this State.

In deciding this case which is one of first impression here, shall we follow the decisions in *Fannin v. Anderson* and *Town v. Meade*, or shall we adopt the doctrine laid down in the case of *Brown v. Delafield*, 1 Denio, 445.

If we had a statute in this State similar to the one which seems to have existed in New York, at the time *Brown v. Delafield* was decided we might very properly perhaps adopt the doctrine announced in that case.

That case decided, that in assumpsit against several debtors, it is no answer to a plea of the statute of limitations that one of them within six years from the accruing of the cause of action departed from the State, and continued absent until the commencement of the suit, and that all the persons liable upon a joint contract must depart from the State in order to arrest the running of the statute against the demand.

Beardsley, C. J., in that case said, "That here was the cause of action on a contract against two persons; one of whom departed from the State within the period of limitation, but the other continued to reside within it.

Such a case, he says, is not within the terms of the section, (2 Rev. Statutes, § 27.)

This language, he says, quoted in the words of the statute plainly refers to a cause of action against *one person alone*, and not where it exists against several persons jointly.

Again, he says, nor is it within the spirit.

Here one of the defendants remained within the State, and both might at any time have been sued under the act relating to

proceedings against joint debtors, and the plaintiff would thus have had judgment against both.

On the return of the absent defendant an action of debt might have been brought against him and his co-defendant therein on the judgment so recovered.

Surely we have no such provision of law in this State.

While therefore the case of *Brown v. Delafield* might be regarded as good law in New York, if there are no decisions in that State overruling it, as was said to be the case in *Denny v. Smith*, 18 N. Y., 567, it cannot be regarded as authority, or even persuasive here, because the conditions and statutes under which it was made have no existence here.

I do not consider it necessary to review other cases cited, either by the plaintiff or the defendants in error.

The points decided in *Fannin v. Anderson* and *Town v. Meade*, seem to be sound in principle.

The contract upon which the suit below was brought, being a joint contract and not a several contract, and the plaintiff below being entitled to a *complete remedy* against all the defendants, the principles ruled in these two cases must rule this case, unless there be something in our Acts of Assembly which excepts it from such ruling.

The counsel of the defendants seem to think they find such cause of exemption under the rules of construction of statutes Chapter 5 of the Revised Code; the second of which rules applicable as they suppose to this case is, "that every word importing the singular number only may extend to and embrace the plural number: and every word importing the plural number only, may be applied and confined to the singular number, as well as the plural."

These rules the Legislature have declared, shall be observed in the construction of statutes, unless such construction would be inconsistent with the manifest intent of the Legislatue, or repugnant to the contest of the same statute."

I do not think that the rule of construction as thus prescribed by the Legislature, will aid the contention of the defendants in this cause.

It cannot be adopted in respect to this case because it would be in direct conflict with the right of the plaintiff as expressly pro-

vided in our Act of Limitations, which expressly provides that "if at the time when a cause of action accrues against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into the State, in such manner that by reasonable diligence he may be served with process."

The action to which the plaintiff was entitled to, was a joint action, and not a several action against Samuel M. Felton, George A. Parker, Samuel Harlan, Jr., and Jesse Lane, as joint contractors, and not several contractors.

The action to which the plaintiff was entitled was against these four persons, and the action which was saved to him under the provision cited, was the same action which accrued to him during the absence of Parker from the State.

The statute does not pretend to save any other action than this joint action.

It does not give to him, nor profess to save to him any other action.

If after the return of Parker the plaintiff had brought any other action than the action against all the four contractors, he could not *effectually* have prosecuted it, by reason of the *non-joinder* of the other co-joint contractors with Parker.

Had the plaintiff sued Felton, Harlan and Lane without joining Parker as a defendant he would have been defeated by the interposition of a plea in abatement, and had he sued all the four and had a *non est* returned as to Parker, and declared against the other three, and recovered judgment, his cause of action against Parker would have been gone, because the claim against him would have merged in the judgment so recovered.

The provision of the Act even when considered in connection with the rule of construction before cited, cannot reasonably be intended as saving to the plaintiff the right of a separate action as against Parker.

We cannot, therefore, give such a construction to our Legislation upon the subject of limitations of actions, as to destroy a legal right of the plaintiff, and, therefore, in my opinion the Act of Limitations as pleaded in this cause is not a sufficient bar in law to the plaintiffs right of recovery in this action.

The judgment below is reversed.

HOUSTON, J.: When this case, the first of its kind in this State, came up for a hearing in the Court below, I was very much struck, as other judges often have been in similar cases with the singular fact then first learned in it by me that it was an action of assumpsit on a verbal contract between the plaintiff and the four joint defendants named in it which had not been commenced until some ten years had elapsed after the accruing of the cause of action, and that two of them who were men of large wealth had been residing ever since in this State and in this city, whilst the third one of them had been residing but comparatively a few miles beyond the limits of them, and during that time had repeatedly been in the State and in this city, and that the fourth one of them only, Mr. George A. Parker, had been residing out of the State, and as far from it only as the city of Boston in the State of Massachusetts, and had not been in this State in the mean time, nor until the commencement of the action against them all jointly. The primary limitation by the statute to such an action of assumpsit is three years simply, but thrice three years and more had stolen in silent slumber over what assumed now very much the aspect of a stale demand when so presented for the first time to my imperfect apprehension and surprise at the novelty of it. The replication to that plea was that the said George A. Parker, one of the said four joint defendants, when the said cause of action accrued against them was out of this State, and that the said action was commenced against them within three years after the said George A. Parker, the said defendant, first came into the State thereafter in such manner that by reasonable diligence he could be served with process, the secondary limitation of the statute therein referred to being in the following words:

"SEC. 14. If at the time when a cause of action accrues against any person, he shall be out of the State, the action may be commenced, within the time herein (before first) limited therefor, after such person shall come into the State in such manner that, by reasonable diligence, he may be served with process." *Rev. Code*, 730.

This being the first case of the kind that has ever arisen under this provision of our statute of limitations, and the striking hardship of its application to three out of the four defendants who

could have been served with process in the State at almost any time within that long period of ten years, at once gave rise to the grave and serious question presented in the demurrer, and ably and elaborately argued by the learned counsel on both sides, whether such a case as this is within the terms and the true meaning and intention of the saving contained in the fourteenth section of the statute as before stated. The words of the section, "if at the time when a cause of action accrues against *any person*, *he* shall be out of the State," &c., it was contended were not only in the singular number, but were intentionally so inserted and employed in it, and were not intended by the Legislature to be interpreted or understood in a plural sense, as equivalent to the terms "person or persons," or as intended to apply to any case in which there were two or more defendants parties to the cause of action, and one of them only was out of the State when it accrued. For with such a construction given to these words of the section, no such hardship could arise as characterizes this case, or any such gross inequality in the legal condition of the defendant as disfigures it; and therefore the Legislature could not have intended that the words here used should in any contingency have any other meaning than that which the *person* in the singular number plainly and naturally imports. By such a construction of it the court avoids any inherent inconsistency or contradiction in the application of the saving to this or any other similar case because it involves even an absolute absurdity to hold that it can apply to save the action as against three of the defendants who at any time after the accruing of the cause of it, could easily have been served with process in this State, while the sole ground, as given in the statute itself, for applying it to the other defendant is because he was out of the State when the cause of action accrued and did not come into it so that he could be served with process, until ten years afterwards when the action was commenced; and for that very reason the court was bound to consider and conclude that the Legislature did not intend that the saving should ever apply to such a case as this. *Capelle & Duncan v. Baker's Executrix*, 3 Houst., 344.

And such being the inclination of my mind on that point at the same time it occurred to me that under the long-established practice in the Superior Court of this State it was competent for

the plaintiff below at any time after the cause of action accrued, to commence the action against all the defendants jointly by having process issued and served on the three, two of whom were living in this State and the other frequently coming into it from his residence in Pennsylvania not many miles above the boundary line between the two States, and returned by the sheriff served personally on them, and *non est* as to the fourth defendant, Mr. Parker, who was out of the State and could not be served with it, and then with such a return of the writ, and the usual recital of it in the declaration as to the defendant who is returned *non est* and does not appear to it, to proceed in the prosecution of the action, as is the usual custom and practice in such cases in that court, against the other defendants to judgment and execution, if necessary, for the amount of it, leaving them after their payment of it to their legal remedy and redress against their absent co-defendant to enforce contribution of his just proportion of it. In such a case as this by the common law the plaintiff would have to proceed to outlawry against the absent defendant and complete the proceeding before he can recover judgment in the action against the other defendants who have been served with process and appeared to the action. But as it is conceded that the proceeding by outlawry at common law is wholly unknown in this State, I was inclined to think that the long established practice in the Superior Court of it, before referred to might have been adopted as a substitute for it, or for the purpose of enabling the plaintiff in such a case to proceed with the prosecution of the action to judgment against the defendants who had appeared to it, without the necessity of resorting to any process of outlawry against the defendant out of the State, and without taking any further notice whatever of him in the prosecution of it against the others who were the only parties defendant before the Court in the action. And if such had been the practice in the Courts of this State in such a case as this, then the plaintiff had been under no disability of suing all and recovering judgment against the defendants appearing to the action at any time since the accruing of the cause of it by adopting this method of prosecuting it against them only whilst their co-contractor was yet out of the State and the jurisdiction of the Court in the case, then my opinion was that the plaintiff's right of action in the case was barred by

the primary limitation of the statute, that is to say, after the expiration of three years from the accruing of the cause of action in it.

But I am now obliged to say that a further consideration of both of these points, and the more thorough argument of them in this court, my opinion has undergone a radical change upon each of them, and that I now think that as the contract sued on in this case was a verbal and joint contract merely between the plaintiff and the four defendants named in the action, and was not a joint and several contract between them, as it would have been under our statute, *Revised Code*, 357, *Sec.* 9, had it been reduced to writing in the same words, unless otherwise expressed in it, for such is the general rule of the common law, that when the action is upon a contract which is a joint contract only, and not joint and several, and there are several joint parties to it on the one side to be sued upon it, they must all, if still in being, be joined as defendants in the action, and it must not only be commenced, but it must be prosecuted against them all jointly and to a joint judgment against them in case of recovery, for there can be no action against them severally, or recovery of judgment against them severally, or against any one or more of them less than the whole number of them. There are some exceptions to this rule, as where one of the joint parties to the contract was a minor when he entered into it, and who by another well-known principle of the common law is only bound on contracts for necessaries furnished him, or has become a bankrupt since entering into it, and who by statute has been released from the legal obligation of his indebtedness upon all his contracts up to the time of his certificate of discharge in bankruptcy. But the general principle of the common law as before stated is certainly quite as rigid and inflexible as it is thus represented to be, and as under the operation of it the plaintiff, Mr. Reybold, could not maintain an action upon the contract against one or more of the defendants, but was compelled by it to sue them all jointly and to recover against them all jointly, or to recover against none of them, and he therefore could not be bound to commence his action against them after the accruing of the cause of it, until the joint process in it with which he had to commence it against them all jointly, had been served upon each and all of them in the State, for the design of the

Act of Limitations is to bar such actions only as the party plaintiff has a legal right to effectually maintain and prosecute to recovery of judgment against the party defendant in any case. It was, therefore, wholly unnecessary to provide by statute for the limitation and bar of any action commenced without a legal right to effectually maintain it.

I had also become convinced in the meantime that no such practice as before stated could have obtained in the Court below in such a case as this to warrant a recovery of judgment against three of the defendants who could have been promptly served with process after the cause of action accrued, without service of it on the other and fourth defendant who was then out of the State and was out of it until some ten years afterwards, in the mode suggested in my opinion in the Court below; and having no statutory provision whatever in this State, such as several of the other States have, to meet such a case involved in such a striking, and to the Court, such an embarrassing contingency as this proved to be, I have since the argument of the case in this Court only been the more convinced, and particularly by the rulings of the Court of Queen's Bench in the case of *Hannin v. Anderson*, 7 Ad. & Ell., 811 (opinion by Denman, C. J.), and *Town v. Mead*, 16 Com. B., 123, that I should renounce the opinion which I then entertained and expressed on that point in the case.

But as to the other point in the case I was not prepared to hold upon the argument of it in the Court below, that the words "any person" contained in the section and saving in question should be read and understood in the singular number only according to the plain and natural meaning of the word "person" in the singular number, and in this case, should be so construed by the Court, and as not applicable to it in the meaning and intention of the Legislature when it was enacted, because it was against four persons, but one of whom was out of the State and beyond the reach of the process of the Court when the cause of action accrued. There are but few questions more perplexing than to solve the meaning of one or more words in a statute in regard to a particular case, if there be in the apprehension of the Court any room for doubt or dispute over it by any of the rules of construction which have been laid down in the books for that purpose; but when the Legislature

itself has by a statute laid down a rule defining the meaning and import of any such word or words occurring in a statute, it is of paramount weight and authority, and should dispose of the question. Among the rules for the construction of statutes enacted by the Legislature, the second is as follows: "Every word importing the singular number only, may extend to and embrace the plural number; and every word importing the plural number only, may be applied and confined to the singular number, as well as the plural," &c. Whilst the tenth rule is in these words: "The word 'person' may extend to and include bodies politic and corporate, as well as individuals." *Rev. Code*, 24, 25. And which in that Court I considered solved the question of the construction to be given to the words "any person" in the 14th section of the act of limitations in favor of the contention of the plaintiff in that Court, and I think so still. And I therefore concur in the opinion of this Court that the judgment in the Court below in this case should be reversed.

DIAMOND STATE IRON CO., Defendant below, Plaintiff in Error *v.* FERRIS GILES, Plaintiff below, Defendant in Error.

Owner of Real Estate—Master and Servant—Negligence—Injuries—Damages—Building Ordinance—Charge to Jury.

The owner of real estate is bound to take care that those who come upon his premises by express or implied invitation be protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited party has no reason to look for.

A servant coming upon dangerous premises without being apprised of the danger by the owner thereof is entitled to damages for injuries thereby sustained.

The right of a servant to recover damages from his employer for injuries sustained by the fall of a building while in his service depends upon the fact whether, under all the circumstances proved, the employer exercised reasonable care and prudence in the erection of the building, and upon which the servant was employed as a carpenter at the time the building fell to the ground.

The master will, however, be exempted from responsibility where the risks are apparent and are voluntarily assumed by a person capable of understanding and appreciating them.

A rolling mill having a trussed roof is within the provision of the building ordinance of the City of Wilmington which provides "that the outside walls of buildings having trussed roofs, such as churches, public halls, theatres, restaurants and the like, if more than sixteen and less than twenty-five feet high, shall average at least seventeen inches in thickness."

When a servant goes upon the roof of a building as an employe of his master, to work thereon, he has a right to assume, without particular investigation or inquiry, that the master has exercised due care and caution in the erection of the building, and has not omitted the performance of any duty in respect thereto which should have been observed by an ordinarily careful and prudent man.

In a charge to the jury all the court said in regard to a particular subject must be considered together, and so interpreted as to make all the expressions on the same subject harmonious and consistent.

(*October 27, 1887.*)

ERROR to the Superior Court to review a judgment* rendered in New Castle County, in favor of the plaintiff below, etc., in an action on the case for personal injuries received from the fall of a building. *Affirmed.*

This was an action on the case brought in the Superior Court in and for New Castle County, at its September term, 1885, by Ferris Giles, the defendant in error, against the Diamond State Iron Company, the plaintiff in error, to recover for injuries suffered by the said Giles, by reason, as is alleged, of the negligence of the company. The defendant below, prior to this suit, was engaged in erecting a large building, to be used in connection with its rolling-mill, on its own land, in the city of Wilmington, and had contracted with a bricklayer to build a brick wall of great lenth and height, as a part of said building. That said wall was built by the contractor, according to plans furnished by, and under the supervision of, the defendant, and supported in part a trussed roof, upon which the plaintiff below was engaged as a carpenter, having entered the employment under a contractor for the wood-work of said building the day before he was injured, and when the roof was nearly finished and closed in. The day after his employment the building fell, and inflicted on the plaintiff below the injuries for which this suit was instituted. The evidence on the part of the plaintiff below tended to show that the building fell by reason of the insufficiency and weakness of the brick wall; that it was built of good material, and that the work of the brick-layer was all that

*See this case in court below, reported on page 453, Current Volume.

it should be, but that the plans prepared by the defendant below were defective, and did not provide for sufficient thickness to the wall; that the attention of the defendant below was called to the thinness of the wall by the contractor, by the foreman of the bricklayers, and by the building inspector of the city. Experts were examined on both sides as to the sufficiency of the wall, and the plaintiff testified that his attention had never been called to the wall previous to going to work upon the roof; and it was proved that the wall, up to the time of its fall, was exceedingly plumb and straight, and was in good and workman-like condition and appearance. It was likewise in evidence that the wall did not conform to the building ordinance of the city of Wilmington in that regard. With some other evidence, as to a violent storm just before the accident, the case was submitted to the jury upon the charge of the Court, and a verdict of guilty was rendered against the defendant below.

The questions presented are stated in the opinion of the Court.

Charles B. Lore, *George H. Bates* and *Edward G. Bradford*, for plaintiff in error, defendant below:

Assuming, for the sake of argument, that the rolling mill came within the provision of the ordinance quoted by the Court below, and that the brick wall did not conform to its requirements, the mere fact of the violation does not entitle the plaintiff below to recover, for unless the falling of the building was caused by the violation of the ordinance, there clearly could be no recovery.

Chicago etc. R. R. Co. v. McKean, 40 Ill., 218, 229; *Briggs v. N. Y. Cent. etc. R. R. Co.*, 72 N. Y., 26, 30; *Mathiason v. Mayer*, 3 Mo., (L. ed.) 119, 7 West. Rep., 739.

Nor could there be a recovery against the defendant below, for any violation of the ordinance, if the plaintiff below can fairly be treated as having assumed the risk of the situation as it was.

Wood Master & S. § 397.

To be actionable, negligence must manifestly be the cause of the injury complained of.

Wharton, Neg., §§ 73, 129; 2 *Thompson, Neg.*, 1085, § 3.

As between employer and employe the former cannot be held

for injuries resulting to the latter, if he has exercised the ordinary care which a prudent man should have observed.

Wood, Master & S., §§ 326, 337, 342; *Wharton, Neg.*, § 212; *Indermaur v. Dames*, L. R. 2 C. P., 311; *Whittaker's Smith, Neg.*, 125.

The employer is not an insurer of the safety of the employe nor can he be held for *culpa levissima.*

Wharton lays this down as one of the fundamental propositions of the law, and especially with reference to the liability of the owners of real estate, for injuries resulting from the unsafe condition thereof.

Wharton, Neg., § 831. See also *Mad River etc. R. R Co. v. Barber*, 5 Ohio St. 541; *Murray v. McLean*, 57 Ill. 7, 378, 382.

In this action the burden of proof was upon the plaintiff to show due care on his part.

Thompson, Neg., 1053; *Whittaker's Smith, Neg.*, 381; *Wharton, Neg.* § 428.

If the plaintiff and defendant below had equal knowledge, or means of knowledge, as to the risk or danger of the falling of the rolling mill there could be no recovery.

This rule is specially applicable to a case like the present, in which the employe was engaged to work upon the thing in which the alleged defect existed.

Priestley v. Fowler, 3 Mees & W., 1; *Williams v. Clough*, and *Griffiths v. Gidlow*, 3 Hurlst. & N., 258, 648; *Senior v. Ward*, 1 El. & El., 385; *Griffiths v. London etc. Docks Co.* L. R., 12 Q. B. Div., 493; *Dynan v. Leach*, 40 Eng. Law & Eq., 491; *Skipp v. Eastern Counties R. Co.*, 9 Exch., 223; *McGlynn v. Brodie*, 31 Cal., 376; *Malone v. Hawley*, 46 Cal., 409; *Hayden v. Smithville Mfg. Co.* 29 Conn., 548, 560; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y., 562, 566.

The plaintiff below having been employed to work upon the premises of the defendant below, was bound to make reasonable use of his eyes and thinking faculties, in order to avoid peril.

Stone v. Oregon City Mfg. Co., 4 Or. 52; *Hughes v. Winona etc. R. R. Co.*, 27 Minn., 137.

He was bound at his peril, therefore, to take notice of patent defects in the rolling mill, upon which he undertook to work.

Gibson v. Erie R. Co., 63 N. Y. 449; *Wood, Master & S.*, §§ 335, 382.

If the plaintiff either had knowledge, or the means of knowledge, which it was his duty to acquire, of the defects, if any, in the rolling mill and the risk connected therewith, he must be considered as having assumed that risk, and could not recover.

Stone v. Oregon City Mfg. Co., *Hughes v. Winona etc. R. R. Co.* and *McGlynn v. Brodie, supra; Way v. Ill. Cent. R. R. Co.* 40 Iowa, 341; 2 *Thompson, Neg.*, 994.

The plaintiff below as a matter of law, must be held to have assumed whatever risk was connected with the thinness of the wall or with the end of the building which was left open, and could not recover.

Priestley v. Fowler, 3 Mees. & W., 1; *Assop v. Yates*, 2 Hurlst. & N., 768; *Seymour v. Maddox*, 5 Eng. Law & Eq., 265; *Wilkinson v. Fairrie*, 1 Hurlst. & C., 633; *Gibson v. Erie R. Co.*, 63 N. Y., 449; *McGlynn v. Brodie*, 31 Cal., 376; *Malone v. Hawley*, 46 Cal., 409; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y., 562; *Ballou v. Chicago etc., R. Co.* 54 Wis., 257, and cases heretofore cited.

In view of the testimony there was no such evidence of negligence on the part of the defendant below as justified the court below in submitting the case to a jury.

Toomey v. London etc. R. Co. 3 C. B. N. S., 146; *Cotton v. Wood*, 8 C. B. N. S., 568; *Hammack v. White*, 11 C. B. N. S., 588.

George Gray and *Levi C. Bird*, for defendant in error, plaintiff below:

The owner who erects, or permits to be erected, an unsafe structure on his land is responsible to those who, without negligence on their part, are injured by reason of the unsafe character of such structure. No intermediate agent or contractor can relieve the owner from such responsiblity, if the structure erected is itself unsafe. The duty which the owner of the land owes to the public and to all persons who come lawfully within, or are lawfully exposed to the danger, is violated by his allowing it to be so erected. The violation of this duty is legal negligence.

Wharton, Neg. § 232, 232 *b*; *Deford v. State*, 30 Md., 204;

Ellis v. Sheffield Gas Co., 2 El. & Bl., 767 ; *Robbins v. Chicago*, 71 U. S., 4 Wall., 657, 678 (18 L. ed. 427) ; *Hole v. Sittingbourne etc. R. Co.*, 6 Hurlst. & N., 488 ; *Vincett v. Cook*, 4 Hun., 318 ; *Indermaur v. Dames*, L. R., 2 C. P., 311.

This is a leading case, and is reported in 1 *Thompson Neg.*, 283, also in Bigelow's Leading Cases on Torts.

Chapman v. Rothwell, Ell. Bl. & Ell., 168 ; *Roberts v. Smith*, 2 Hurlst. & N., 213 ; *Terry v. Ashton*, and *Bower v. Peate*, L. R., 1 Q. B. Div., 314, 321 ; *Gray v. Pullen*, 5 Best & S., 970, 983 ; *Francis v. Cockrell*, L. R. 5 Q. B., 501, 513 ; *Pickard v. Smith*, 10 C. B. N. S., 470 ; *John v. Bacon*, L. R. 5 C. P., 437 ; *Holmes v. North Eastern R. Co.*, L. R. 4 Exch., 254 ; *White v. France*, L. R. 2 C. P. Div., 308 ; *Smith v. London etc. Docks Co.*, L. R. 3 C. P., 326 ; *Heaven v. Pender*, L. R. 11 Q. B. Div., 503, 515 ; *Combs v. New Bedford Cordage Co.*, 102 Mass., 572.

When a servant is injured when engaged about the business of his master, by the negligence of the master, the master is liable, upon the same principle that he would be liable to a stranger who came lawfully within the danger.

Shearman and Redf. Neg., § 89 ; *Beach, Cont. Neg.*, §96 ; *Wharton, Neg.*, §§ 205, 207, 214 ; *Clarke v. Holmes*, 7 Hurlst. & N., 937, 943, 946, 949 ; *Smith Neg.*, 419 ; *Hough v. Texas & P. R. R. Co.*, 100 U. S. 225 (25 L. ed. 617) ; *Britton v. Great Western Cotton Co.* L., R. 7 Exch., 130, 137, 139 ; *Wood, Master & S.*, § 334 ; *Bigelow, L. Cas. Torts*, note 706.

The ordinary risks of the particular employment are assumed by the servant who voluntarily enters it ; but the negligence of the master is not one of those risks ; the negligence of fellow servant is.

Beach, Cont. Neg., §§ 95, 96 ; *Hough v. R. R. Co.*, and *Roberts v. Smith, supra ; Wood, Master & S.*, § 359 ; *Northern Pac. R. R. Co., v. Herbert*, 116 U. S., 642, 647 (29 L. ed. 755) ; *Murphy v. Phillips*, cited in *Wharton, Neg.*, § 210 ; *Pollock, Torts*, 323.

If the injury suffered by the plaintiff was by reason of the negligence of the defendant itself in constructing on its premises an unsafe and weak wall, in a building upon which it invited or employed plaintiff to work—and of this abundant evidence was offered to the jury, and they have passed upon it—no question of

its being one of the risks of his employment to be assumed by the plaintiff, can be properly considered in this case, because: Although it is undoubtedly true that a servant undertakes the ordinary risks of the employment which he voluntarily enters, which include the risk of the negligence of fellow servants, it is an equally well established rule of law that the negligence of the master is never one of the risks of employment so undertaken by the servant. In fact the negligence of the master may be said to be the one risk of all others which the servant does not undertake.

Clarke v. Holmes, 7 Hurlst. & N., 937, 943, 946, 949; *Smith Neg.*, 419; *Hough v. Texas & P. R. R. Co.*, 100 U. S., 225 (25 L. ed., 617); *Britton v. Great Western Cotton Co.* and *Northern Pac. R. R. Co., v. Herbert, supra; Bradbury v. Goodwin*, 2 Ind. (L. ed.), 681, 6 West. Rep., 590; *Beach, Cont. Neg.*, § 123.

As to distinction between knowledge of defects and knowledge of risks.

Cook v. St. Paul etc. R. Co., 34 Minn., 45; *Russell v. Minneapolis etc. R. Co.*, 32 Minn., 230; *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y., 368; *Madden v. Minneapolis etc. R. Co.*, 18 Am. & Eng. R. R. Cas., 63.

Every one entering the employment of another has a right to assume that his employer has been guilty of no negligence by himself or his agents as to those things under his control, and which may affect the safety of those entering upon such employment.

Chicago etc. R. R. v. Swett, 45 Ill., 197; *Ill. Cent. R. R. v. Welch*, 52 Ill., 183; *Chicago etc. R. Co., v. Jackson*, 55 Ill., 492; *Cumberland etc. R. R. Co. v. State*, 44 Md., 283; *Paulmier v. Erie R. R. Co.*, 34 N. J. Law, 151; *Gibson v. Pac. R. R. Co.*, 46 Mo. 163; 2 *Thompson, Neg.*, 1052,

In regard to injuries resulting to a servant from the negligence of the Master, the question is considered juridically precisely as in other cases where the relation of master and servant does not exist, and the injured party was lawfully and properly within the danger.

Indermaur v. Dames, L. R., 2 C. P., 311; 1 *Thompson Neg.*, 283; *Ashworth v. Stanwix*, 3 El. & El., 701; 2 *Thompson, Neg.*, 974, 975.

Cook v. St. Paul etc. R. Co., 34 Minn., 45, supports the court

below in the doctrine that while the servant assumes the ordinary risks of his employment, yet he does not stand upon the same footing with the master as respects the matter and duty of care in inspecting and investigating the risks to which he may be exposed; and that the servant has the right to presume that the master has fully done his duty.

So also *Russell v. Minneapolis R. Co.*, 32 Minn., 230; *Coombs v. New Bedford Cordage Co.*, 102 Mass., 572, 595, 599; *Chicago etc. R. Co. v. Jackson*, 55 Ill., 492; *Hole v. Sittingbourne etc. R. Co.*, 6 Hurlst. & N., 488, 490, 492–495, 497, 499; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Plank v. N. Y. Cent. etc. R. R. Co.*, 60 N. Y., 607; *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa., 389; *Ryan v. Fowler*, 24 N. Y., 410.

The undisputed proof in this case is that plaintiff did not know of any peril attending his going upon the building in question; and there is nothing in the case to show that he ought to have known it.

On the other hand there was abundant evidence submitted to the jury, that defendant was notified of the insufficiency of the wall; and even if he did not know of its insufficiency, the case is just one of that kind that the law must say that it was his duty to know.

Deford v. State, 30 Md., 179; *Ryan v. Fowler*, 24 N. Y., 410; *Madden v. Minneapolis etc. R. Co.*, 18 Am. & Eng. R. R. Cas., 63; *Bean v. Oceanic Steam Nav. Co.*, 24 Fed. Rep., 124; *Totten v. Pa. R. R.*, 11 Fed. Rep., 564, 566, 567.

The servant cannot be expected to exercise more skill or judgment than the master.

Wood, Master & S., 679; *Chicago etc. R. Co. v. Jackson*, 55 Ill., 492; *Cayzer v. Taylor*, 10 Gray., 274.

The charge of a Court to the jury must be taken together, and if it harmonizes as a whole, and correctly presents the law, a new trial will not be granted because a separate instruction does not contain all the conditions which are to be gathered from the entire text. *People v. Doyell*, 48 Cal., 85.

Instructions to the jury, and modifications of proposed instructions, are to be construed not as abstract propositions, but as they would be understood in the light of the particular circum-

stances of the case as disclosed by the evidence. *Sword v. Keith*, 31 Mich., 247.

It is not error to refuse instructions asked by counsel, if the Court correctly gives the law upon all points arising in the case. *Crisman v. McDonald*, 28 Ark., 8.

Although some of the instructions of the Court to the jury may not state the law with precise accuracy, yet, if taken as a whole, they are substantially correct, and could not have misled the jury to the prejudice of the defendant, the judgment will not be disturbed. *People v. Cleveland*, 49 Cal., 578.

Where the principles declared in a request have already been properly laid before the jury in other instructions, the request may be refused. *McGonigle v. Dougherty*, 71 Mo., 259; *Railway Co. v. Ross*, 112 U. S., 395, 5 Sup. Ct. Rep., 184; *Bank v. Bank*, 21 Wall., 294, 301; *Walburn v. Babbitt*, 16 Wall., 580.

SAULSBURY, CHANCELLOR:

What is negligence? The term is relative and its application depends upon the situation of parties and the degree of care and vigilance which circumstances reasonably impose. That degree is not the same in all cases, but may vary according to the danger involved in the want of vigilance.

All the surrounding or attendant circumstances must be taken into account when the question involved is one of negligence. Negligence in a legal sense is no more or less than the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.

Negligence is sometimes classified as gross negligence, ordinary negligence and slight negligence; but this classification only indicates that under the special circumstances great care and caution are required, or only ordinary care or only slight care. If the care demanded is not exercised, the case is one of negligence; and a legal liability is made out when the failure is shown.

There is no contention in the present case as to the relation which existed between the plaintiff below and the defendant below. That relation was one of master and servant. A master's negligence may consist in subjecting the servant to the dangers of un-

safe buildings or machinery, or to other perils on his own premises which the servant neither knew of nor had reason to anticipate or to provide against when he entered the employment or subsequently. The general rule is that while the owner of real estate is not bound to provide safeguards for wrong doers, he is bound to take care that those who come upon his premises by express or implied invitation be protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited party had no reason to look for.

The invitation to come upon dangerous premises without apprising him of the danger is just as culpable, and an injury resulting from it is just as deserving of compensation in the case of a servant as in any other case.

No reason of public policy, and none to be deduced from the contract of the parties, can be suggested, which should relieve the culpable master from responsibility. A man cannot be understood as contracting to take upon himself risks which he neither knows or suspects nor has reason to look for, and it would be more reasonable to imply a contract upon the part of the master not to invite the servant into unknown dangers than one on the part of the servant to run the risk of them. But the question of contract may be put entirely aside from the case; and the responsibility of the master may be planted upon the same ground which would render him responsible if the relation had not existed. Whether invited upon the premises by the contract of service or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes the duty to the party accepting it, to see that at least ordinary care and prudence are exercised, to protect him against dangers not within his knowledge and not open to observation. It is a rule of justice and right which compels the master to respond for a failure to exercise this care and prudence.

While these propositions are true, it is equally true that the master will be exempted from responsibility in all cases where the risks are apparent, and are voluntarily assumed by a person capable of understanding and appreciating them. No employer by any implied contract undertakes that his buildings are safe beyond a contingency, or even that they are as safe as those of his neighbors or that accidents shall not result to those in his service from risks

which others would guard against more effectually than is done by him. Neither can a duty rest upon anyone which can bind to so extensive a responsibility.

Negligence does not consist in not putting one's buildings or machinery in the safest possible condition, or in not conducting one's business in the safest way; but there is negligence in not exercising ordinary care that the buildings and machinery such as they are shall not cause injury and that the business as conducted shall not inflict damage upon those who are guilty of no neglect of prudence.

These general remarks in reference to the duties, rights and liabilities resulting from the relation of master and servant will tend to illustrate what I conceive to be the principle which should govern in the decision of this case, which is that the right of the plaintiff below to recover damages from the defendant below depends upon the fact whether, under all the circumstances proved, the latter exercised reasonable care and prudence in the erection of the building it did erect, and upon which the former was engaged as a carpenter for hire at the time that building is proved to have fallen.

Was the erection of that building, under all the circumstances proved in the cause, reasonable or lawful? And was such reasonable care and prudence exercised by the corporation in the erection of it under all the circumstances, and upon which the plaintiff, as its servant, was employed at the time he received the injuries, compensation for which he brought his suit, and was the law as given in charge by the Court to the jury properly subject to the exceptions taken by the appellant?

These questions necessarily lead in the first instance to the inquiry whether the erection of the building itself was lawful; for if the erection of the building itself was not lawful while such erection in and of itself on account simply of its illegality can give to the plaintiff no right of private action against the corporation, yet it may have a very material influence in determining the liability of the corporation to the plaintiff for compensation and damages for any injuries proved to have been sustained by the plaintiff while working as the servant of the corporation in and upon such illegal building.

By section 7 of an ordinance providing for building regulations, for a building inspector, and prescribing his duties for the City of Wilmington, approved January, 1885, it was, among other things, ordained as follows:

"In *all business buildings*, such as stores, warehouses, factories, public schools, etc., the thickness of outside walls of such structures, *two stories* in height, shall not be less than *thirteen* inches for the first and second stories respectively. For buildings *three stories* in height the walls shall not be less than *seventeen* inches in thickness for the first story, and thirteen inches for the second and third stories, respectively. For buildings *four stories* in height the walls for the *first* and the *second* stories shall be *seventeen* inches in thickness and those of the third and fourth stories *thirteen* inches, respectively. The outside walls of buildings having trussed roofs, such as churches, public halls, theaters, restaurants and the like, if more than sixteen and less than twenty-five feet high, shall average at least seventeen inches in thickness."

Now while a rolling mill, such as the building erected by the appellant, may, as I think, without the least impropriety, be called a factory, it is not such a building as was contemplated in the first paragraph or sentence of the ordinance as herein cited, for a building two stories in height was thereby contemplated; nor was it a building contemplated by either or any of the other provisions of said ordinance as cited, unless it was such a building as was contemplated in the last sentence of such ordinance as I have cited it.

My opinion is that it was such a building as was and is contemplated and meant in and by said last sentence quoted from said ordinance. Such sentence is the only one in said ordinance which embraces buildings having trussed roofs such as churches, public halls, theaters, restaurants and the like. The building erected by the appellant was only one story in height, and it had a trussed roof.

The ordinance manifestly was meant for the protection of all persons who should have occasion to be in said building, either as employees or for other lawful purposes and objects. The protection of persons who might lawfully be in churches, public halls, theaters, restaurants and the like, was certainly the object of the provision of this ordinance. The words, "And the like" occurring after the

particular buildings or structures mentioned cannot properly be interpreted as limiting the buildings having trussed roofs to uses similar to the uses to which churches, public halls, theaters and restaurants are particularly appropriated; but are meant to give extension to the uses to which buildings having trussed roofs may be properly applied, and protection to persons properly and lawfully in any such buildings having trussed roofs, whatever their lawful uses may be, was as much intended by this provision of the ordinance as it was to the persons who might be in churches, public halls, theaters or restaurants. The designation of these particular buildings was meant, as the Court below very properly said, as an illustration and not as a limitation.

Trussed roofs are roofs packed or bound closely. They are necessarily very heavy roofs; and although they are sometimes said to be self-supporting, this is said only in respect to their being packed or bound closely and not otherwise; for their weight when supported either by walls or pilasters is uncommonly heavy in comparison to the weight of other kinds of roofs.

It is stated in the opinion of the Court below, and I suppose correctly, for it is a part of the record in this Court, that the rolling mill or building erected by the defendant below and plaintiff in error was 250 feet long, fifty-six or fifty-seven feet wide and twenty-one feet high to the square. One side was to be a brick wall twenty.one feet high from the foundation and nine inches or one brick thick with pilasters sixteen feet apart from center to center, seventeen inches (or two bricks) in thickness and about twenty-six or twenty-seven inches wide. The other side of the building and one of its ends were built of wood but the other end was left open from the ground at the instance, as the Court below says, and by the orders of the defendant, through its agents (there being no other floor), to the square of the building.

"This opening was," says the charge, "about fifty-six feet wide by twenty-one feet high."

"The nine inch wall," says the charge, "was pierced in the middle of the space between each of the pilasters with an opening for a window about 4½ wide by seven or eight feet high, in which window frames were secured."

"The whole structure," says the Court, "was covered by what

was called by the witnesses a trussed roof, self supporting and framed as shown by the plans exhibited. Upon the brick wall was a wooden plate three inches thick and thirteen wide and properly secured where the pieces of it were joined to make it continuous. There were girders resting upon this plate over each of the pilasters; they were well secured to the wall through the plate, according to the testimony."

There was nothing resting upon the nine inch wall but the plate described. All the actual weight, therefore, of the truss frame, with its covering of inch boards and longitudinal ventilator of 250 feet, and slating to be done upon the whole, was to be borne by the pilasters, with the lateral support the nine inch walls between them would give to them. This was the building upon which, on July 28, 1885, the plaintiff below went to work as a carpenter and servant of the defendant below. On the next day while the plaintiff was working upon the roof as a carpenter or upon a longitudinal ventilator, the building fell, and the plaintiff received the injuries in respect to which he instituted the action below.

Now I think it may be safely stated in conformity with the decisions in well adjudged cases, that a servant when he goes upon the roof of a building as an employe of his master, to work thereon, has a right to assume, without particular investigation or inquiry into the fact, that the master has exercised due care and caution in the erection of the building, and has not admitted the performance of any duty in respect thereto which should have been observed by an ordinarily careful and prudent man.

The employment of the plaintiff below did not necessarily require a minute inspection of the whole building, and every part thereof, in order to ascertain whether the owner of the building had properly performed his duty in respect to work, not a part of that which the servant, as a carpenter, was more immediately connected with. He had a right to assume, unless his attention was directed to the contrary thereof, that the defendant below had performed, with ordinary prudence and care, as a reasonable and prudent employe, its whole duty in respect to the erection of the building, so far as the same had been then completed. His attention was not called or directed by the defendant, or any other per-

son as far as the record shows, to any imperfection in the building or work theretofore done by others in respect thereto.

In this case the defendant interposed in the Court below, and in the argument before us, the defense of contributory negligence.

Regarding the case of a negligent injury the general result of the authorities (says Cooley, in his work on Torts, 674) seems to be that if the plaintiff or party injured by the exercise of ordinary care under the circumstance might have avoided the consequence of the defendant's negligence but did not, the case is one of mutual fault; and the law will neither cast all the consequence upon the defendant, nor will it attempt any apportionment *of it*.

This, he says, is the English rule, and that it has been accepted by the Courts in this country.

Judge Cooley cites with apparent approbation the opinion of *Mr. Justice* Whiteman, in a case before him, in which the following language is used, as the proper rule on this subject:

"It appears to us that the proper question for the jury in this case, and indeed of all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the first case plaintiff would be entitled to recover, in the latter not; as but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care and caution would not, however, disentitle him to recover, unless it were such that but for that negligence or want of ordinary care and caution the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part have, avoided the consequences of the neglect or carelessness of the plaintiff."

In delivering the charge to the jury below, the Court necessarily had in view the building such as it was proved before them to have been, and all the circumstances attending its erection.

There is comparatively little said in the charge, in respect to the care and diligence which the master should have observed in causing the building to be erected, or in respect to the degree of

negligence which would render the defendant below responsible in damages to the plaintiff below for the injuries he had received by reason of its fall.

After the charge had been delivered to the jury, and the counsel for the defendant had called the attention of the Court to certain specific prayers which they had made for instruction, the *Chief Justice* then observed that "When the charge covers instructions, the Court is not bound to review the points which the charge covers."

The record discloses that the Court then read separately the instructions presented by the defendant's counsel, and said: "We decline to give instructions on the point covered by the first, as we have already instructed you on that point when we said that a man ought to exercise due care in a case of that kind, and must take something beyond the ordinary care in putting up a building of that kind."

What was the building thus alluded to? It was the building, a description of which had been given in the charge and heretofore alluded to by me—a building erected contrary to the ordinances of the city and for the erection of which the plaintiff was subject to a penalty; a building to the defects in the plan of which the attention of the president of the Corporation had been specifically directed, and to the defects in which it is not proved that the attention of the servants or employees had been directed.

I cannot believe that this remark of the *Chief Justice* did mislead, or was calculated to mislead the jury in the finding of their verdict. There certainly was evidence enough to justify the verdict rendered, without attributing to these words, which were spoken in reference to a "building of that kind," any effect greater than that manifestly intended.

There is but one other prayer for instruction that I deem it necessary to refer to, and that is the eighth, which is in these words: "That if the jury, from the evidence, believe that the building in question would not have fallen at the time it did fall, but for wind pressure upon the building; and shall further believe that the building would have fallen under that wind pressure, even if the brick wall between the piers had been thirteen (13) inches in thick-

ness, plumb and properly constructed, then the plaintiff cannot recover."

The charge of the Court below, in respect to the storm that was alleged by the defendant to have occurred on the afternoon of July 29, 1885, was in these words: "If you should find that the building would have resisted any usual storm in this latitude, the same as other similar buildings of large proportions and well built do, but that the storm that overthrew it was extraordinary, such as builders do not provide against or contemplate in planning their architecture, then the defendant is entitled to your verdict. But the plaintiff is entitled to it, unless the defendant shows this to your satisfaction. *Prima facie* when a building falls it is from negligence or insufficient construction; it lies upon a defendant, who is such on that account, to prove the causes over which he had no control, and for which he is not responsible, brought about the result. It is a most unusual thing for a house to fall to the ground; and he who, by no fault of his, suffers injury by it has a right to call upon the owner for compensation for such injury. If he resists the action he must show that he was in no default whatever."

Thus the charge upon this matter rested, when first delivered to the jury.

The exception taken to the charge of the Court in respect to this matter of the storm is as follows: "That the said Court erred in charging the jury that unless the storm was a phenomenal one, such as builders do not provide against and do not contemplate, that one is liable if a building falls by reason of that storm."

I see no just exception to the charge of the Court, as originally read to the jury.

Examples of that form of charge are to be found in other cases, and in other Courts.

It was only after the charge had been read and the attention of the Court directed particularly to this prayer for instructions by the counsel for the defendant that the *Chief Justice* said that he had told the jury "That unless the storm was a phenomenal one such as builders do not provide against and do not contemplate, that one is liable if the building fall by reason of that storm."

Now these words must be construed in connection with words used by the same judge in his charge. All the Court said upon this

subject of storm and wind pressure, must be considered together, and so interpreted as to make all the expressions on the same subject harmonious and consistent.

Considered as an entirety the charge must be construed as meaning by the description of a storm as phenomenal as an "Extraordinary storm such as builders do not provide against or contemplate in planning their architecture."

It certainly would not be strictly accurate to speak of a storm as a phenomenon or as phenomenal in its character.

Phenomenal means pertaining to a phenomenon in appearance. Phenomenon in a general sense means an appearance; anything visible; whatever is presented to the eye by observation or experiment; or whatever is discovered to exist; as, the phenomenon of the natural world; the phenomenon of heavenly bodies; or of terrestrial substances. It sometimes denotes a remarkable or unusual appearance, or an appearance whose cause is not immediately obvious.

But we do not sit to determine hypercritically the meaning of words, but to give to them a fair and rational interpretation, according to the intention and sense in which they are used.

The building erected by the defendant below was not such as met the requirements of the ordinance above referred to. The average thickness of its outside brick wall was not at least seventeen inches, but only slightly over ten inches when the thickness of the pilasters is added to the thickness of that part of the wall which was only nine inches thick.

This defect in the construction of the outside wall was known to the defendant, and was not proved to have been known to the plaintiff below.

The building fell and the plaintiff received injuries thereby, compensation for which in damages the jury (after considering all the facts in the cause) have duly awarded.

Without extending this opinion further it is sufficient to say that after considering fully the other causes assigned we deem them insufficient to justify a reversal of the judgment of the Court below, and that *judgment is therefore, affirmed.*

WILLIAM W. PARVIS, Defendant below, plaintiff in error, *v.* SAMUEL P. TRUAX, plaintiff below, defendant in error.

Replevin—Venue.

In an action of replevin the *locus in quo* is "material and traversable" and the venue must be alleged and proven.

(*November 9, 1887.*)

WRIT OF ERROR to Superior Court, Kent County.*

At the trial of this cause, at the April Term, A. D. 1886, it was proved by Samuel P. Truax that William H. Grasley, some time prior to the 18th day of April, A. D. 1884, informed him, the said Truax, that he wanted to buy of him a certan horse, and that he, the said Truax, informed him that he would take one hundred and fifty dollars for the said horse. That on the 18th day of April, A. D. 1884, the said William H. Grasley went to the home of the said Truax and renewed the treaty for the purchase of said horse. That said Truax then told said Grasley that he would take one hundred and fifty dollars for the said horse, and he, the said Grasley, agreed upon that price, and then also said he would like to have time, as he had not the money to pay the cash, to which said Truax replied —all right. That it was then agreed between them that the purchase money for said horse should be secured by two judgment notes for seventy-five dollars each, bearing date April 18th, 1884, and payable in four and six months. That this conversation occurred in the lane running by the barn. That the said Grasley and Truax then went into the house of the latter, and said Grasley filled up and signed two judgment notes, according to the understanding and agreement made between them in said lane. That said Grasley then handed the said notes to said Truax, who examined them, and said, "they are all right," and laid them on the table. That immediately afterwards a conversation between them ensued about the horse, lasting for a very short time, after which the said Grasley, without any demand or solicitation on the part of said Truax, told him, the said Truax, that he, the said Grasley, had better give him an article of agreement, to show that the said horse was to belong to the said Truax until the said notes were paid, in order to protect

*See this case in Court below reported on page 330, Current Volume.

him, the said Truax, in case of said Grasley's death. That said Truax then said—"Suit yourself." Whereupon the said Grasley endorsed the following writing upon the said note last payable, viz:

"Smyrna, April, 1884. This day I have bought of Samuel Truax, one bay colt, four years old. The said colt belongs to him until this two notes are paid.

Witness—Robert Mitchell. W. H. GRASLEY."

Samuel P. Truax also testified that after said Grasley had written and signed the endorsement above mentioned, Graseley and said Truax went to the stable, and Truax put a halter upon the horse and delivered him to the said Grasley.

Samuel P. Truax, at the time of the sale of the said horse said he would have trused the said Grasley for five hundred dollars worth of stock.

Samuel P. Truax further testified that, prior to the issuance of the writ of replevin, that he, the said Truax, in company with Isaac Truax, his brother, went to the said William W. Parvis and told him that he would like to have the said horse; to which said Parvis replied—"I cannot spare him." The said Samuel P. Truax then said—"Would he let him have the horse if he could get as much for him as the sheriff sold him for?" to which the said Parvis then replied—"I cannot spare him."

It was also given in evidence by Isaac Truax, witness for said Samuel P. Truax (who was present at the time the said Samuel P. Truax told the said Parvis that he would like to have the said horse), that the said Samuel P. Truax demanded the said horse; to which the said Parvis replied—"I cannot spare him." That the said plaintiff also gave in evidene the writ of replevin in the case with return thereon of the Sheriff of Kent County, showing that defendant retained the horse mentioned by giving counter bond.

There was evidence on the part of the said William W. Parvis that the said judgment notes were absolutely assigned to William P. Smithers on the 11th day of October, 1884, which assignments were in the words and figures following, to wit:

"For value received I do hereby transfer and assign to Wil-

liam P. Smithers, his executors, administrators, and assigns, all my right and interest in and to the within note. Witness my hand and seal this 11th day of October, A. D. 1884.

SAM'L P. TRUAX, [SEAL].

Witness—George Underwood, Thomas A. Reese."

"For value received I hereby transfer and assign to William P. Smithers, his executors, administrators, and assigns, all my right and interest in and to the within note. Witness my hand and seal this 11th day of October, A. D. 1884.

SAM. P. TRUAX, [SEAL.]

Witness—George Underwood, Thomas A. Reese."

With marks drawn across the same.

It was further testified by the said Samuel P. Truax that the said notes were never reassigned to him by the said William P. Smithers, although he states that he had redeemed said notes and paid the principal and interest thereof to the said Smithers and that said notes were delivered into the possession of said Samuel P. Truax by the said William P. Smithers.

That there was further given in evidence, on the part of the said William W. Parvis, a postal card, addressed to John S. Herrington by the said Samuel P. Truax, in relation to the costs of the said suit, in the words and figures following, viz:

"SMYRNA, March 8, 1886.

Mr. John S. Herrington—Dear Sir: Yours at hand. In reply will say, you will have look to Isaac Truax for the costs, as he agrees to pay all costs in said suit. This agreement he made with Mr. Fulton. I have turned all my claim over to him. He employed Mr. Fulton to work up the matter, and proposes to make witness of me when needed. S. P. TRUAX."

Samuel P. Truax, being recalled by plaintiff, declared that he had spoken to his brother, Isaac Truax, about paying the costs in the suit, as he was short of funds, and the above card had reference to that fact; and the said Isaac Truax, being recalled, declared he had not a cent's worth of interest in the case, but it was altogether his brother's.

A question was also made between the counsel on each side in regard to where the alleged demand was made by the plaintiff upon the defendant for the horse, the plaintiff's counsel contending that both Samuel P. Truax and Isaac Truax said it was at defendant's stables in Leipsic, and the defendant's counsel contending that the place of the alleged demand was not mentioned by the witness. This question was submitted to the jury by the Court.

And thereupon the counsel for the said William W. Parvis prayed as follows:

1. That the action being local and the venue not proven, the plaintiff is not entitled to recover.

2. That it must be proven that there was a positive demand and refusal before the replevin writ was issued, otherwise plaintiff is not entitled to recover.

3. If the jury believe the agreement for conditional sale was signed after the terms of sale were complete; or that said agreement was a mere afterthought and voluntary act of William H. Grasley; or that said agreement was merely for the benefit of said Grasley, and designed to protect the horse from his creditors, the plaintiff is not entitled to recover.

4. It is for the jury to say whether plaintiff did not, by the absolute assignment of the two notes, or by the transfer of all his claim—as mentioned in the postal card—or by other action or conduct, waive any condition which may have been connected with the original sale.

Whereupon the Court charged the jury as reported on page 333, current volume.

Assignment of Error.

1. That the Court erred in declining to give the first instruction, as prayed for by the defendant.

2. That the Court erred in charging the jury that the action of replevin is transitory, except in cases of damage feasant and distress for rent.

3. That the Court erred in charging the jury that "the action "of replevin having been extended, particularly in this country, "to illegal taking of personal property, under any circumstances, "against the owner's consent, and being in fact a very familiar,

"and, in truth, the only action where the very goods *in specie* can "be recovered, which were tortiously taken, it would seem most "reasonable that it should, as to such cases, be no longer treated "as a local action."

4. That the Court erred in charging the jury that the 12th section of Chapter 106 in the Revised Code, about "pleading and practice," "would seem to have been intended to dispense with "any statement of venue, or proof of it, in any suit, except where "the facts, or nature of the case, show that the suit has (where the "form, for example, is trespass on case) relation to, or is in some "way connected with the realty."

5. That the Court erred in charging the jury that—"without "intending, however, to decide the question," (that is, the question whether the action of replevin is local or otherwise)—"definitely, "it is sufficient to say, that as we declined to non-suit the plain- "tiff at the close of his case, for alleged want of proof of venue, "so now we refuse to give the jury the instruction the defendant "prays for; besides it would be improper to do so, in view of the "fact that the plaintiff contends, though disputed by the defend- "ant, that he proved the alleged demand and refusal to have been "made on the defendant in the county. That is for the jury." Whereas the Court ought to have charged the jury that if the jury believed that there was not sufficient proof that the said Samuel P. Truax did make a demand upon the said William W. Parvis for the said horse, and that he, the said Parvis, refused to surrender the same, in Kent county aforesaid, then they should find for the defendant.

6. That the Court erred in declining to instruct the jury that the action of replevin is local.

7. That the Court erred in not charging the jury according to the third prayer of the defendant.

8. That the Court erred in charging the jury "that while the "question" (that is, whether the sale of said horse was condi- tional or absolute,) "is not one altogether free from difficulty, "still we think that everything that was done upon the occasion "of closing the negotiations should be treated as part of them, as "they were simultaneous. It is true that when the notes were "drawn up and signed, read by Traux and approved, the original

"understanding or bargain was complete, and Grasley could then "have demanded the horse, and no right to refuse delivery would "have existed; yet the proposal of Grasley with respect to owner- "ship, accepted by Truax, in effect opened the agreement and "added a new term to it—just as a new stipulation added to a "closed contract, made in the proper manner, before the separa- "tion of the parties, and intended to form a part of it, is treated "to be a part of it. It is a contemporaneous writing about the "same subject matter, and, when so intended, is part of the orig- "inal. In this view we decline to give you the third instruction "in question."

9. That the Court erred in charging the jury in respect to the second prayer of the defendant, that "it is common enough for a "party holding another's obligation, for example, to present it and "say, 'I should like to have the money on this.' No doubt a "debtor well understands what such a communication means." Because such language or example employed to illustrate the point in hand was calculated to mislead the jury as to the nature and character of the legal demand that said Truax was required to make upon the said Parvis for said horse, in order to maintain his writ of replevin.

10. That the Court erred in charging the jury that "with re- "spect to the fourth and last prayer, we yield to it so far as to say, "that if you are satisfied that by the assignment of the notes by "Truax to William P. Smithers he intended to make an election "or choice between his two remedies for the sale of his horse, and "chose to rely upon the notes for the purchase money, rather than "the right to retake, secured by the contract of sale, he must be "held to that choice and fail in this action." Whereas the Court ought to have charged the jury that by the absolute assignment of the two notes by Truax to Smithers, the said Truax waived any condition which may have been connected with the original sale, if any condition ever did exist.

11. That the Court erred in charging the jury that "As to the "postal card offered in evidence by the defendant, it cannot be "held to defeat this action, the cause of which having been trans- "ferred to Isaac Truax, is treated as subsisting for his benefit."

James Pennewill and *James L. Wolcott* for the plaintiff in error:

At common law replevin would lie not only in cases of distress and damage feasant, but also in other cases of wrongful taking.

Vin. Abridg., Vol. 18, 576; 6 Comyn. Digest, 224; *Archibald's Nisi Prius*—Law Library, 49, top pags, 442; 1 Tidd's Practice, 4 and 5; 1 Chitty's Pleadings, 164; *Meller v. Leather & Clough*, 72 Eng. C. L., 619 (Ellis & Black, 1, 619); *George v. Chambers*, 11 M. & W., 149; *Stephen on Plead*, 2 Appendix, Note 2, CIX.; *Saund. on Plead. and Ev.*, 228; 2 Sel. Nisi Prius., 348; 3 Coke (Sir Henry Constable's case), 107–108; 7 Coke, 80–81; *Pangborn v. Patridge*, 7 John., 140; *Sleeper & Co. v. Osgood*, 50 N. H., 331.

Replevin was at common law a local action, and is the same in this country wherever it is not changed to a transitory action by legislative enactment.

1 Saund., 347, Note 1; 1 Chitty's Plead., 268; Saund. Plead. & Ev., 287; Stephen on Plead., 161; *Sleeper & Co. v. Osgood*, 50 N. H., 331; 2 Greenl. Ev., Sec. 562; *Robinson v. Mead*, 7 Mass., 353; *Emmett & Emmett v. Briggs*, 1 Zabriskie, 53; *Williams v. Welch*, 5 Wend., 290; *Windsor v. Boice*, 1 Hous., 605.

The 12th Section of Chap. 106 of Revised Code of this State, concerning "Pleading and Practice," does not change the common law character of replevin, and make the same a transitory action. The venue therefore must be laid in the declaration and proved at the trial.

In an action of replevin for the detention of property, where the taking was lawful, the plaintiff, before he can recover, must prove that he made a demand for the property before the writ was issued, and that the defendant refused to deliver it up.

Any agreement whereby the sale of personal property is made conditional and not absolute, must be a part of the original contract of sale.

Alderdice et al. v. Truss et al., 2 Hous., 268.

In cases of conditional sales the vender may waive the condition and thereby make the sale absolute. In this case the condition

was waived by the absolute assignment of the notes given to secure the purchase money for the horse, whereby the vender relinquished his right to retake the horse.

Conditional sales are not favored in law, especially where the rights of innocent third parties have intervened.

J. Alexander Fulton, for the defendant in error.

I.

The action is not local.

1. Not by the principles of the common law. 1 Chitty Pl., 268; *MeKenna v. Fisk*, 1 How., 241; *Robinson v. Mead*, 7 Mass., 353; *Williams v. Welch*, 5 Wend., 290.

2. Not under our statute. Revised Code, chapter 106, sections 12, 19.

3. The question was left to the jury. See opinion.

II.

The sale was not complete till the horse was delivered. The bargain was made at one single interview, without break or interruption whatever, and ended in the delivery of the horse.

III.

Whether or not there was a demand was properly left to the jury.

IV.

In regard to the assignment:

1. It was fully cancelled before demand was made for the horse, or suit brought, and the assignee fully paid.

2. It was a transaction between other parties, and the defendant had no concern with it.

3. The horse "*belonged*" to the plaintiff until the notes "*were paid,*" and, as they never were paid, it mattered not who held them.

V.

As to the effect of the postal card, it is only necessary to say that the Court, under the evidence, charged much more favorably for the defendant than he had any right to expect.

1. The card itself proved nothing. But

2. The evidence of both Samuel P. and Isaac Truax fully explained the postal and showed that Isaac had no interest whatever in the suit.

Samuel testified, in regard to the check, (see bill of exceptions,) "I had spoken to my brother Isaac about paying the costs in the suit, as I was short of funds, and the card had reference to that fact."

Isaac testified: "I have not a cent's worth of interest in the case; it is altogether my brother."

HOUSTON, J., delivered the opinion of the Court:

The main question presented in this case is whether an action of replevin for a horse wrongfully taken and detained by the defendant below from the plaintiff below, on a demand made by him for the possession of it, is a local or a transitory action in the Courts of this State? At common law in England it was ruled as early as the reign of Queen Elizabeth, at least, that the action of replevin is a local action, and that it is necessary to allege in the declaration in it the place of taking, as well as the vill or parish, otherwise the defendant may demur; but the omission is cured by pleading over or after verdict. The place, and vill or parish are material and traversable. 1 Saund., 347, *n.* (1.) by William Hob., 16; *Reade v. Hawke*, Cro. Eliz., 896; *Ward v. Lavile*, Moor., 678, *Ward v. Lakin*, 1 Brownl., 176; *Read v. How*, 1 Sid., 9, 10; *Weston v. Carter*, Carth., 186; *Traverton v. Hicks*. Where the defendant took the goods in another place than is mentioned in the declaration, he may plead *non cepit*, and give that fact in evidence, and non-suit the plaintiff. 1 Str., 507, *Johnson v. Wollyer*. The report of the case is brief. It was tried at Guildhall before Pratt, C. J., in the 8th year of the reign of George the First. Replevin in London, defendant appears upon an *elongata*, plaintiff declares for taking guns *in quodam loco vocat'* the *Minories* in *London*; defendant pleaded *non cepit modo et forma*. At the trial the plaintiff proved the taking at Rotherhithe in Surrey; upon which it was objected that the plaintiff had not proved his issue, for the place is material, and therefore part of the issue under the *modo et forma*. The counsel for the plaintiff admitted that it was traversable; but insisted that by not traversing it particularly, the place

was admitted, and could not be insisted on upon *non cepit*. But the *Chief Justice* held that where the defendant avows at a different place, in order to have a return, he must traverse the place in the count, because his avowery is inconsistent with it; but where he does not insist upon a return, he may plead *non cepit*, and prove the taking to be at another place, for it is material. Whereupon the plaintiff was non-suit.

In the same note Williams also says: The plea of *cepit in alio loco* is to be considered as a plea in bar and not in abatement; and it is upon this authority and the cases cited by him that Mr. Greenleaf in his American work on evidence lays down the rule of the common law on this question in the action of replevin in the following terms: "The general issue in this action is *non cepit*, which admits the plaintiff's title, and under which it is incumbent on the plaintiff to prove, that the defendant had the goods, in the place mentioned in the declaration; for the action being local, the place is material and traversable. Proof of the original taking in that place is not necessary, for the wrongful taking is continued in every place in which the goods are afterwards detained. But under this issue the defendant cannot have a return of the goods; if found for him, it merely protects him from damages. If he would defend on the ground that he never had the goods in the place mentioned, he should plead *cepit in alio loco* which is a good plea in bar of the action. This plea does not admit the taking as laid in the declaration; and therefore, the plaintiff must prove such taking or fail to recover. 2 *Greenl. Ev. Sec.* 562. And this so far as the venue of the county, at least, is concerned, we have always understood and considered to be the rule in the courts of this State in all actions of replevin for the wrongful taking or detention of personal property, and not merely when the action is for distress for rent, or for cattle damage feasant; as it has long been, and still is an action of more frequent occurrence in this State for the wrongful taking or detention of goods and chattels with out such a claim, than with such a claim on the part of the defendant, and has as long existed here without any distinction being recognized between them in respect to the application of this rule, either by statute or the decision of our Courts, until this case occurred in the Court below; for we do not think

that the statutory provision contained in chapter 106, section 12, Rev. Code, 648, abolishes, or was designed to abolish this rule and principle of the common law so long established in the pleading and practice of the Courts of this State, as to the materiality of the place of taking mentioned in any action of replevin, nor in any other action or case where the place of taking, or in which the act is alleged to have been done, the place may be material or traversable. The words of the section are, "It shall not be deemed necessary, in any declaration, or other pleading, to lay the venue in the county in which the action is brought, nor to set forth in any manner the place in which an act is alleged to have been done, unless when, from the nature of the case, the place may be material, or traversable." But we have seen from the authorities before cited that at common law, and according to the long established course of pleading and practice in actions of replevin in the Courts of our State, the place of the taking of the goods alleged in the declaration, on an issue presented by the plea of *non cepit modo et forma*, or of *cepit in alio loco*, which have been and still continue to be very common pleas here in the action, has uniformly been considered to be material and traversable; and so far from considering that the Legislature intended to alter or abolish this rule of pleading and practice in the action replevin in this State, we are strongly inclined to think it was designed to exempt and exclude it from the operation of the section just read under the exception embraced in the concluding words of it, as follows: It shall not be deemed necessary in any declaration, or other pleading, to lay the venue in the county in which the action is brought, nor to set forth in any manner the place in which an act is alleged to have been done, "unless when from the nature of the case, the place may be material, or traversable." As we understand the rule of the common law and the pleading and practice in the Courts of this State at the time of the enactment of the section and chapter referred to in all cases of civil actions, there is none to which this exception would more clearly and conclusively apply than in an action of replevin as then known and recognized here. Nor can we think there is any good ground for a difference or distinction in the meaning and import of the terms themselves between "the nature of the case" as it occurs in this clause of this section, and "the

nature of the action" as usually employed by members of the profession and writers on the law. "A case," as here referred to and the word employed imports means a civil action of some form and nature between two or more parties in a Court of law, either decided or still pending, which may be of different kinds, but the first and most prominent distinction between them, when they differ from each other, is the form and legal nature of the action in which the case is instituted, and the best general indication of this distinction in the nature of these different cases in Courts of law, is the different forms of action in which they are commenced. The judicial record of such cases when completed and made up in Court consist of the original writ which fixes the form of the action at common law, the declarations, pleadings and issues joined in it, and the judgment of the Court thereupon. And if the plaintiff mistakes the nature of his case or the nature and form of the action adapted to it, in general at common law he cannot maintain the action, but will be non-suited by the judgment of the Court if demanded on the other side. The pleadings also vary very considerably in these various actions and cases at common law with the several forms of action appropriately adapted to them, and with the issues of fact as well as law joined and presented in the pleadings; but whatever may be the form of the action or the difference of the pleadings in it from those in any other action, each is alike usually termed a case, or an action at law, and usually import one and the same thing; and accordingly the words "the nature of the case," as employed in this provision of the section, means the same as if the words employed in this connection had been "the nature of the action," instead of the nature of the case, for it is the difference in the nature and character of the various actions at law which constitutes the substantial distinction between them; and we therefore consider this exception in the 12th section of the chapter to mean in general terms the same thing in this case now before the Court, as if it had specially provided, in the following terms: "unless when, from the nature of the case, as in an action of replevin, the place may be material, or traversable."

As it appears from the record that the Court below declined to sustain the motion for a non-suit on the alleged ground that the plaintiff had failed to prove the venue of the action in Kent

County as laid in the declaration, but concluded to leave the question as to the proof on that point to be decided by the jury subject to the instructions of the Court when it should come to charge them generally on the evidence and the points of law in the case, with our conviction and belief that the action of replevin is a local action in all cases under the rules of pleading and practice long established in the courts of this State, we have come to the conclusion that the Court below should have instructed the jury in explicit terms in its charge to them in the case, with the further instruction under the circumstances that unless they were satisfied from the evidence before them that it had been proved that the cause of action, the taking or detaining of the horse in question by the defendant from the plaintiff, was in Kent County, the plaintiff could not recover in the action, and their verdict should be for the defendant. But as it declined to give such instructions to the jury, although prayed for by the counsel for the defendant below, we consider that it was error in the Court to do so; and therefore the the judgment of this Court is, that the judgment of the Court below must be reversed, and it is reversed.

INDEX.

ACCEPTANCE—See GUARANTY.

ACTION, PENDING.

1. An Act of the Legislature, passed April 6, 1881, provided that the provisions of said Act should "not apply to any civil action or proceeding pending at the time of its passage;"

A writ of summons was issued out of the Superior Court, February 23, 1881, returnable to the May Term following; and on May 15, 1881, said writ was returned "*non est inventus*;"

An *alias* summons was afterwards issued and service thereon obtained. *Held*, at the trial, that the issuing of the writ on February 23. 1881, constituted an action pending for the purposes of the said Act, and that the *alias* summons, in legal effect, was a continuation of the first writ. *Rice v. McCaulley*, 226.

AGENT—See MARRIED WOMEN, 2; MUNICIPAL CORPORATIONS.

AGREEMENT—See CONTRACTS.

AMENDMENT—See PLEADINGS.

ANIMAL, BITE OF—See DAMAGES, 1.

APPEAL.

An appeal to reverse a judgment rendered upon a case stated and referred by the parties to the opinion of the court, without a reservation in the case stated of the right of appeal. Appeal dismissed. *Elliott v. Montell*, 194.

APPLICATION OF PROCEEDS.

The proceeds of a private sale of a portion of his personal property by the defendant in executions, under an agreement with his execution creditors that the proceeds be applied to the executions according to priority, must be applied by the first lien creditor to his execution debt and not to an unsued note; and a creditor, whose claim was not in execution at the time of the private sale, but being in execution at the time of the Sheriff's sale, might insist upon this application and thereby become entitled to the proceeds of the Sheriff's sale of the balance of defendant's goods. *Trimble & Co. v. Hurst, Miller & Co.*, 14.

APPRAISEMENT—See INVENTORY and APPRAISEMENT.

ARBITRATION AND AWARD.

1. When by consent of parties their controversies, including all matters of account, claims, debts, or demands which they may have against each other and then in dispute, are submitted to arbitrators selected and agreed upon by them without a rule of reference out of court, the arbitrators thus appointed are the judges of all items in controversy whether legal or equitable, and both parties

ARBITRATION AND AWARD—*Continued.*

are bound in law by the award, unless there be good grounds shown for avoiding the same. *Stewart v. Grier*, 378.

2. In such an arbitration any matter in question in the nature of a partnership account between the parties is subject to the determination of the arbitrators. *Ibid.*

3. The award of arbitrators in such a case, when by the terms of the articles of submission, if it was made within the time limited it should be final and conclusive, will be confirmed by the court, unless good cause be shown for avoidance. *Ibid.*

4. Any material error or defect apparent on the face of such an award as misconduct or mistake of the arbitrators in making their award in such a case may not be shown in bar of an action at law for nonperformance of the award, but the remedy must be pursued in equity. *Ibid.*

5. The failure of the arbitrators to be duly sworn or affirmed before proceeding in the arbitration will vitiate the award. *Ibid.*

6. The parties to arbitration having bound themselves in a certain sum to abide the award, said sum is in the nature of a penalty and no greater amount can be collected than the amount specified in the award with interest from the date of the award. *Ibid.*

7. The power of awarding the costs of the arbitration was necessarily incident to the authority conferred on the arbitrators, though not mentioned in the articles of submission. Comegys, C. J., dissents. *Ibid.*

ARBITRATORS—See ARBITRATION and AWARD.

ASSESSMENT—See TAXES.

ASSIGNEE—See LIENS.

ASSIGNMENT.

1. A voluntary assignment executed by a debtor to a trustee of his own selection, without the assent of his creditors, is invalid as against such creditors, and the property thus assigned is subject to execution attachment on the process of said creditors. *Elliott v. Montell*, 194.

2. Chapter 187, Volume 15, in regard to voluntary assignment for benefit of creditors, does not conflict with Section 4 of Chapter 132 of the Revised Code. *Ibid.*

See LIEN.

ATTACHMENT—See ASSIGNMENT, 1; EXECUTION, 2.

ATTORNEYS—See LIENS.

AWARD—See ARBITRATION and AWARD.

BANK STOCK—See EXECUTION, 2.

CHANCERY.

The ancient jurisdiction of the Court of Chancery to order partition between tenants in common is not affected by the statute law of this State; and where the assistance of the Court of Chancery is otherwise needed in adjucating between tenants in common, partition may be ordered where it will promote the several interests of the litigants and it is prayed for in the bill. *Bradford v. Robinson*, 29.

See APPEAL.

CHARGE TO JURY.

In a charge to the jury all the court said in regard to a particular subject must be considered together, and so interpreted as to make all the expressions on the same subject harmonious and consistent. *Diamond State Iron Co. v. Giles*, 557.

CONDITIONAL SALES.

1. A person having sold personal property upon conditional sale, taking judgment notes for the price thereof, must make his election between his two remedies, and if he rely upon the notes for the purchase price, he thereby abandons his right to retake the property as secured by the contract of sale. *Truax v. Parvis*, 330.

2. A conditional sale of goods and chattels is valid, and the burden of proving it rests on the plaintiff. *Forbes v. Martin*, 375.

See SALES.

CONSIDERATION—See SALES.

CONSTITUTIONAL RIGHT—See CORPORATIONS.

CONTRACTS.

1. In order to bind an illiterate man by a written instrument, it must have been honestly and fairly read or explained to him, and be of such a nature that such a man could understand what it means. It need not be shown that he did understand it. *Green v. Maloney*, 22.

2. A person having signed a paper which was read to him is presumed to have understood it, and he may not aver against it unless he can show that it was falsely and fraudulently obtained. *Ibid.*

3. A note written to the plaintiffs by the defendant, requesting them to let a third person have what goods he requires and oblige the writer, is not a guarantee, but an original undertaking, and the goods thereupon furnished may properly be charged to and recovered from the defendant.

Nevertheless, if the plaintiffs looked for payment primarily to the person receiving the goods, and only secondarily to the person making the request, the writing then becomes a guarantee, and the plaintiffs cannot recover against the defendant without having notified her of the acceptance of the guarantee. *Buckingham v. Murray's Ex'rs*, 176.

4. A new stipulation, added to a closed contract, made in the proper manner, before the separation of the parties, and intended to form part of the contract, will be so treated. It is a contemporaneous writing about the same subject matter, and when so intended is part of the original. *Truax v. Parvis*, 330.

5. The law does not imply a promise for payment of board as between near relatives, as father and child, and in order to recover for the same there must be an express promise proven. *Bradley v. Kent's Ex'r*, 372.

6. The certificate of the Insurance Commissioner cannot legalize insurance transactions entered into prior to the date of said certificate, said transactions being contrary to the provisions of the law prohibiting any such insurance unless

CONTRACTS—*Continued.*

previously authorized by the said certificate of the Insurance Commissioner properly obtained. The plaintiff cannot recover upon premium notes taken prior to the issuance of said certificate of the Insurance Commissioner authorizing the plaintiff to do business in this State. *Beeber v. Walton, Whann & Co.*, 471.

7. Supplying a nurse to a sick boarder is no part of the ordinary contract of boarding. And the plaintiff, being a married woman, having nursed a sick boarder in the family of her husband, with an understanding that she should be paid for said nursing, may recover in her own name the value of said services out of the estate of said sick person, afterwards deceased. *Hogg v. Lobb's Ex'r*, 399.

8. The contract not in writing being joint and not joint and several, the cause of action was joint and not joint and several and all the parties liable must be declared against jointly. *Reybold v. Parker*, 526.

See APPLICATION OF PROCEEDS; CORPORATIONS MUNICIPAL, 1, 2; HUSBAND AND WIFE; PLEADING, 4; REAL ESTATE, 3; SALES; TITLE TO LAND; WILLS, 2.

CONSTRUCTION OF STATUTES—See STATUTES, CONSTRUCTION OF.

CORPORATIONS.

1. A corporation is an artificial being and possesses such powers only as are conferred upon it by its charter, either expressly or as incidental to its existence. *Coyle v. McIntyre*, 44.

2. A stockholder in a private corporation has such an interest in it and its affairs as will entitle him to an inspection and copies of its books, papers and accounts on reasonable and proper occasions, and when they become material to him as evidence in a suit with another. When this right is denied him by the company, or any of its agents having the custody of said books, there being no other specific remedy, a writ of mandamus will issue to enforce the same. *Richardson v. Swift*, 137.

3. A foreign corporation, holding property and doing business within this State, is considerated and treated as a domestic corporation, having the same rights and protection in the carrying on of its business and enforcement of its contracts, and being subject to the same duties and answerable to the same tribunals and in a similar manner, as domestic corporations. *Ibid.*

4. A non-resident stockholder of a foreign corporation, said corporation owning property and doing business in this State, has a right to inspect and make copies of the books of said corporation for use in a suit in another State, they being in the custody of its president residing in this State, and is entitled to a writ of mandamus for the enforcement of said right against said president, he being within the jurisdiction of this court. *Ibid.*

5. A foreign corporation, by its charter limited in its operations to the State of its creation, is not entitled to the writ of mandamus against another foreign corporation. *B. & O. Tel. Co. v. D. & A. Tel. and Tel. Co.*, 269.

6. The rights, privileges and immunities in the several States secured by the Federal Constitution to citizens of other States, does not apply to corporations. *Ibid.*

7. A stockholder in a private corporation is entitled to an inspection and copies

CORPORATIONS—*Continued.*

of its books, papers and other documents at proper times and on proper occasions, the stockholder showing clearly a right on his part to such inspection and copies; and on refusal thereof by the *custos* of such documents, may have a mandamus to compel said *custos* to allow the same; and the corporation need not be made a party to the proceedings. *Swift v. Richardson*, 338.

8. When a foreign corporation holds property and does business within this State it subjects itself to the law of this State in the same manner and to the same extent, in respect to such property and business, as it would be bound to were it a coporation created by this State, and owes obedience to the mandates of the courts of this State in these respects as if it were a domestic corporation. And a non-resident stockholder of said corporation has the same rights in respect thereto as a resident stockholder. *Ibid.*

CORPORATIONS, MUNICIPAL.

1. A municipal corporation is a body politic and corporate established by law to assist in the civil government of the State with delegated authority to regulate and administer the local or internal affairs of a city, town or district which is incorporated; and is created exclusively for the public advantage without other endowments than such as the government may bestow upon it, and may be controlled and its constitution altered and amended by the legislature in such manner as the public interest may require. There is but one party to it and therefore it is not founded upon contract. *Coyle v. McIntyre*, 44.

2. The city of Wilmington is a public municipal corporation. It is merely a revocable agency instituted by the State for the purpose of carrying out in detail the objects of government. It has no vested right to any of its powers or franchises. It can acquire and hold property for public uses only. Its charter, or act of incorporation, is in no sense a contract with the State. It is subject to the control of the Legislature who may enlarge or diminish its territorial extent or its functions, and may change or modify its internal arrangement or destroy its very existence at discretion without the consent or even against the will of the inhabitants. None of its franchises, rights or powers are held independently of or in defiance of the Legislature. The Legislature may appoint all or any of the corporate agencies through which it acts. *Ibid.*

3. The act of the Legislature establishing a Board of Water Commissioners for the city of Wilmington is constitutional and valid; and the commissioners appointed by the Legislature in said Act may remove the chief engineer of the Water Department of the City of Wilmington, who was appointed by the City Council, and appoint another in his place; and by mandamus may require the said chief engineer to surrender his office and the property connected therewith to his successor thus appointed. *Ibid.*

4. It is the duty of an incorporated city to keep its streets in a good and safe passable condition; and in regard to the work in relation to said streets the same degree of diligence is required as a good business man would show under like circumstances. *Kent v. Wilmington*, 397.

COSTS—See ARBITRATION and AWARD, 7.

CUSTOM.

1. A special custom becomes established when it has been used so long that the memory of man runneth not to the contrary. *Stimmel v. Brown*, 219.

2. The conflict of testimony of credible witnesses, inhabitants of the same city, repels the idea of an established custom. *Ibid.*

DAMAGES.

1. The owner of a dog, it being a domesticated animal, is liable for any injury it may do to another only in case he knows it is accustomed to bite or has a ferocious, savage disposition, or propensity to bite. Proof of such knowledge on the part of defendant is sufficient to enable plaintiff to recover for personal injury thereby sustained; and the fact that the dog is commonly kept confined by the owner is evidence of such knowledge.

Verdict for plaintiff should include such damages as necessarily arose from the injury sustained, as nursing, medical attendance, pain, fear and apprehension of hydrophobia, and loss from having been disabled from pursuing his usual business. *Warner v. Chamberlain*, 18.

2. The *amount* of damages must be proven before allowed by a jury. *Stimmel v. Brown*, 219.

3. If the verdict be for the plaintiff, he is entitled to damages for the expenses incurred in being treated and attended; for his bodily pain and suffering; for hindrance from pursuing his employment, and loss of wages from his disability by reason of its permanency. *Giles v. Diamond State Iron Co.*, 453.

4. In such a case exemplary damages should not be awarded. *Ibid.*

See INNKEEPER; MASTER and SERVANT.

DECREE—See EQUITY.

DEED—See EVIDENCE, 2, 3.

DEFENCE IN ORPHANS' COURT—See ORPHANS' COURT.

DELIVERY—See SALES.

DEMAND—See REPLEVIN, 2, 3; SALES, 10.

DEMURRER—See PLEADING, 2, 3, 4.

DEVISE—See WILLS.

DILIGENCE—See MASTER and SERVANT; CORPORATIONS MUNICIPAL, 4; STATUTE OF LIMITATIONS, 1.

DOMESTIC RELATIONS—See CONTRACTS, 4, 6; DOWER.

DOWER.

An agreement between husband and wife and a trustee for the latter, made during coverture, that in consideration of her enjoying separately, and absolutely controlling her separate property, she would relinquish her dower in his lands, will not be effective as an equitable bar to her right of election to take dower in lieu of the interest given to her by her husband's will. *McCaulley's Ex'r v. McCaulley*, 102.

See ORPHANS' COURT.

EJECTMENT.

An equitable title to land will not maintain an action of ejectment. *Windsor v. Bacon*, 1.

See REAL ESTATE, 3; WILLS, 5, 6, 7.

EQUITY.

Under the statute law of this State, where a trust is established in a suit in equity, instituted for that purpose, all the parties in interest having been heard, a decree against an infant is as effectual as against persons *sui juris*. *Bradford v. Robinson*, 29.

See ORPHANS' COURT; SUBROGATION.

ESTOPPEL—See TITLE TO LAND.

EVIDENCE.

1. A written instrument must be duly proven to have been executed by the person sought to be charged with it. This may be done by the subscribing witness proving his own handwriting only. Such proof is *prima facie* evidence of its due exetion, and thereafter the burden of disproving the same is upon the defendant. *Green v. Maloney*, 22.

2. If the instrument of writing under which possession is obtained does not describe specifically the land to be conveyed, the acts and conduct of the parties in giving and taking possession will be treated as part of the transaction and supply the defect in the instrument. *Lynch v. Cannon*, 386.

3. Evidence of a deed having been made for a tract of land, the non-production of it having been satisfactorily accounted for, if believed by the jury, will be sufficient to sustain their verdict. *Ibid.*

4. A copy of the record from the recorder of deeds in a county in another State showing the change of name of plaintiff, said change having been made by the Court of Common Pleas of said County and ordered by said Court to be recorded in said recorder's office and this being the only record of said proceedings under the law of said State, being properly certified, is admissible in evidence.

Plaintiff's book in which the minutes of its proceedings are kept and also containing a copy of its by-laws which were adopted on the report of a committee of the directors, admitted in evidence, though objected to as not being the original report of said committee. *Beeber v. Walton, Whann & Co.*, 471.

See CONTRACT, 4; DAMAGES, 1; FRAUD; PLEADING, 7; PROOF; WITNESS.

EXECUTION.

1. In New Castle County a sheriff's return of a *fieri facias* was "levied on goods and chattels as per inventory and appraisement annexed." The inventory and appraisement was made by the sheriff alone and had a memorandum at the foot thereof by the defendant in the writ acknowledging the same to be a true list and appraisement of his property. It appeared that such an inventory and appraisement of the property and return of the writ had long been the practice in said county. The *levy held* sufficient and binding. *Flinn & Jackson v. Fennimore*, 262.

2. Where certain bank stock had been attached upon *fi. fa.* attachment in the hands of the sheriff, the Court ordered the same, or a sufficient portion thereof to

EXECUTION—*Continued.*

be sold in satisfaction of said writ, notwithstanding the cashier of said bank had been notified that said stock had been sold, but it not appearing to whom it had been sold and no transfer of the same having been made on the books of the bank. *Trimble & Co. v. Vandegrift*, 451.

See APPLICATION OF PROCEEDS; ASSIGNMENT, 1, 2; SALES, 7, 9.

EXECUTORS AND ADMINISTRATORS.

There being no order by the Register of Wills requiring the executor to advertise the grant of letters testamentary, notice in writing of a claim against the estate was not necessary; but notice, though not in writing, before final account was passed and distribution of the residue is sufficient. *Bradley v. Kent's Ex'r*, 372.

See PLEADING, 2; WILLS; WITNESS.

EXEMPLARY DAMAGES—See DAMAGES, 4.

FIERI FACIAS—See EXECUTION.

FRANCHISE—See MUNICIPAL CORPORATION, 2.

FRAUD.

Fraud is a matter of fact to be proven and will never be presumed. *Kirkley v. Lacey*, 213.

See CONTRACTS, 2; MARRIED WOMEN, 3; SALES, 3, 6, 7, 9.

FOREIGN CORPORATIONS—See CORPORATIONS.

GUARANTY.

1. A party tendering a guaranty for future and prospective credits is entitled to notice of acceptance of the same, and without such notice will not be held liable. Said notice must be given within a reasonable time after the acceptance of the guaranty. Making the proposed advances is not such an acceptance of the guaranty as will bind the party tendering the same. *Farmers' Bank v. Tatnall*, 287.

2. On April 1, 1883, the plaintiff gave notice to the defendant of the default of a third party to meet certain paper which had been discounted by the said plaintiff on the faith of a written guaranty from defendant. The guaranty was dated February 14, 1882, and no notice of the acceptance of the same had ever been given by plaintiff to defendant, other than the notice of April 1, 1883. Said notice is not within a reasonable time as required in law. *Ibid.*

See CONTRACTS, 3.

GUARDIAN—See STATUTE OF LIMITATIONS, 7.

GUEST—See INNKEEPER.

HEIR—See WILLS.

HUSBAND AND WIFE.

A married woman cannot recover for services rendered to her husband's employer, said husband having previously contracted for the services of his family and himself and said married woman's services having been rendered while living with her husband. *Valentine v. Tantum*, 402.

See DOWER; MARRIED WOMEN, 2; WITNESS.

INFANT.

A minor is entitled to a rehearing if applied for within six months and to an appeal within two years after his disability ceases. *Bradford v. Robinson*, 29.

See EQUITY.

INNKEEPER.

1. An innkeeper is bound for the safe keeping of the beast of his guest. *Russell v. Fagan*, 389.

2. Guests of an inn are travelers or wayfarers alone, and it is for them alone that the extraordinary responsibility of the innkeeper exists, and not for boarders or persons residing in the same place. *Ibid.*

3. A traveler or wayfarer who seeks and obtains entertainment for his beasts upon consideration of reward or pay charged him by the innkeeper, is a guest, though not receiving personal entertainment; and while such entertainment for his beast continues, he is absolutely liable for any damage or loss to the same, except such as arise from inevitable accident, the public enemy, or the act or conduct of the guest or his friends or servants. *Ibid.*

INSURANCE—See PLEADING, 4, 7.

INSURANCE COMMISSIONER—See PLEADING, 7.

INVENTORY AND APPRAISEMENT—See EXECUTION, 1.

JURISDICTION—See CORPORATIONS, 4; JUSTICE OF THE PEACE; MANDAMUS, 2.

JUSTICE OF THE PEACE.

A suit upon a foreign judgment is not within the jurisdiction of a justice of the peace in this State. *Baldwin v. Coyle*, 327.

LATERAL SUPPORT—See REAL ESTATE, 1, 2.

LEGISLATIVE CONTROL—See CORPORATIONS, MUNICIPAL, 1.

LEVY—See EXECUTION, 1; REPLEVIN, 3.

LIENS.

An attorney losses his lien upon a fund by taking an assignment of the fund itself.

An attorney has no lien upon a fund which he was not instrumental in creating, and which never came to his hands. *Fulton v. Harrington & Dunn*, 182.

See APPLICATION OF PROCEEDS; EXECUTION; SALES, 7, 9; SUBROGATION.

LIMITATION OF ACTIONS—See STATUTE OF LIMITATIONS.

MANDAMUS.

1. The writ of mandamus is an appropriate remedy for the enforcement of private rights where there is no other adequate remedy. The right to use it must first be obtained from the proper court, which has a discretion, but not an arbitrary discretion, in granting it. *Richardson v. Swift*, 137.

2. The writ of mandamus and the right to it in all cases to which it is applicable is clearly recognized in the jurisprudence of this State; but issues only where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate

MANDAMUS—*Continued.*

legal remedy; the writ is never granted in doubtful cases. *Swift v. Richardson*, 338.

See CORPORATIONS, 4, 5, 7; CORPORATIONS, MUNICIPAL, 3.

MARRIED WOMEN.

1. Under the statute in this State a married woman, with her own money and property, may engage in any kind of business, as a *femme sole*. *Kirkley v. Lacey*, 213,

2. A married woman may carry on her business through an agent and may constitute her husband such agent, who may as such do anything pertaining to said business. *Ibid.*

3. The business thus carried on is not a fraud upon the creditors of the husband if his money is not used in the conduct of the same. *Ibid.*

See CONTRACTS, 6; HUSBAND AND WIFE; STATUTES, CONSTRUCTION OF, 1.

MASTER AND SERVANT.

1. The master must provide the servant with safe and proper implements with which to work and a safe place in which to work, and must keep him, while at work, from exposure to danger from any cause or source within the control of the master, and not incident to the employment or trade of the servant. A violation of these duties will entitle the servant to an action for damages against his master. *Giles v. Diamond State Iron Co.*, 453.

2. When a servant voluntarily undertakes a perilous service for his master, and the peril is as well known to the former as the latter, or by the exercise of prudent care on the part of the former (and which it was his duty to take) he might become acquainted with it, he will have no right to an action against his master if he be injured while in the performance of such service. *Ibid.*

3. If the injury is caused by a distinct part of the general work done by other servants, the duty of prudent caution, or circumspection, did not rest with the same weight upon the injured servant as if occasioned by defective work or material within his own particular line of labor, unless the danger was so obvious as to fasten the servant with knowledge of it. *Ibid.*

4. The plaintiff being employed as a carpenter to work upon the roof a building which was being erected by defendant, the walls being completed and part of the roof being on before the beginning of such service, was not bound to inspect the walls of the building to ascertain its safety before going upon the roof; and he is entitled to damages sustained by the falling of said walls, while he was thus engaged. *Ibid.*

5. It having been suggested to defendant that the walls of the building were inadequate in thickness and not in accordance with the requirements of the ordinances of the city in regard to the thickness of walls of buildings, he became liable to any damage sustained by the workman on account of such defect. *Ibid.*

6. If the building would have resisted any usual storm in the latitude, the same as other buildings of large proportions and well built, and if the storm that overthrew it was extraordinary, and such as builders do not provide against or contemplate in planning their architecture, then the defendant is not liable. *Ibid.*

MASTER AND SERVANT—*Continued.*

7. The owner of real estate is bound to take care that those who come upon his premises by express or implied invitation be protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited party has no reason to look for. *Diamond Staie Iron Co. v. Giles*, 557.

8. A servant coming upon dangerous premises without being apprised of the danger by the owner thereof is entitled to damages for injuries thereby sustained. *Ibid.*

9. The right of a servant to recover damages from his employer for injuries sustained by the fall of a building while in his service depends upon the fact whether, under all the circumstances proved, the employer exercised reasonable care and prudence in the erection of the building, and upon which the servant was employed as a carpenter at the time the building fell to the ground. *Ibid.*

10. The master will, however, be exempted from responsibility where the risks are apparent and are voluntarily assumed by a person capable of understanding and appreciating them. *Ibid.*

11. When a servant goes upon the roof of a building as an employe of his master, to work thereon, he has a right to assume, without particular investigation or inquiry, that the master has exercised due care and caution in the erection of the building, and has not omitted the performance of any duty in respect thereto which should have been observed by an ordinarily careful and prudent man. *Ibid.*

See DAMAGES, 3, 4; HUSBAND and WIFE.

MEASURE OF DAMAGES—See DAMAGES.

MECHANICS' LIEN.

A fence is a structure within the meaning of the Mechanic's Lien Law, but no part of a brick house which it adjoins or on the same property. *Riverside Lumber Co. v. Hampton*, 486.

MINOR—See EQUITY; INFANT.

MUNICIPAL CORPORATIONS—See CORPORATIONS, MUNICIPAL.

NON-RESIDENT—See CORPORATIONS.

NOTICE—See EXECUTORS and ADMINISTRATORS; GUARANTY.

OFFICE—See CORPORATIONS, MUNICIPAL.

ORDINANCE—See MASTER and SERVANT, 5, 6; STATUTES, CONSTRUCTION OF, 4.

ORPHANS' COURT.

The Orphans' Court in this State is not a Court of Equity and has no power to refuse an order to assign dower upon any other defence than one which would be available at law. *McCaulley's Ex'rs v. McCaulley*, 102.

OUSTER—See STATUTE OF LIMITATIONS, 2.

PARTIES—See PLEADING, 5.

PARTITION—See CHANCERY.

PAYMENT.

Nothing but actual money, or what is accepted as such, is payment of a debt. *Slaughter v. Slaughter*, 482.

PERSONAL PROPERTY—See APPLICATION OF PROCEEDS; CONDITIONAL SALES; EXECUTION; REPLEVIN; SALES; WILLS, 3, 4.

PLEADING.

1. The plea of the statute of limitations is a bar to the action, upon proof of the elapsed time, unless the plaintiff replies specially that before the cause of action accrued, or that after the cause of action accrued, and within three years thereafter, the defendant left the State and never afterwards, up till the time of bringing the suit, returned into the State so that by reasonable diligence he could be served with process. *Dukes v. Collins*, 3.

2. Upon demurrer to the plea of the statute of limitations in an action of assumpsit against the administrator for a distributive share of the estate the plea of the statute *held* to be a complete bar to the action. *Buckmaster v. Reed*, 207.

3. A demurrer in whatever stage of the pleadings it is taken reaches back in its effect through the whole record, and in general attaches ultimately upon the first substantial defect in the pleadings on whatever side it may have occurred—defects in substance not being aided by the adverse party's pleading over, as formal defects are. *Pierson Bros. v. Springfield F. & M. I. Co.*, 307.

4. The express conditions set forth in a policy of insurance are conditions precedent to the commencement of an action thereon by the plaintiff. The cause of action is not complete without showing performance of all the conditions on the part of plaintiff, or matter in excuse. By the terms of the policy, action was post poned until the expiration of sixty days after due notice of the fire and satisfactory proofs of the loss were received at the office of the company. There being no averment in the narr that such notice and proofs were given and furnished by the plaintiffs to the defendants at the place specified sixty days before the suit was brought, the declaration is therein defective in substance and judgment will be given for the defendant. *Ibid.*

5. A suit on a bond given to A and Son, if brought in the name of A alone, will be dismissed for want of proper parties. *Reynolds v. Grier*, 329.

6. In an action of replevin the place not being "material or traversable" the venue need not be averred or proven. *Truax v. Parvis*, 330.

7. The certificate of the Insurance Commissioner showing the plaintiff's right to do business in this State was not admitted in evidence, there being no allegation or averment in the declaration that the corporation had lawful authority to do business in this State. *Beeber v. Walton, Whann & Co.*, 471.

8. Leave to amend pleadings granted during the course of the trial. *Ibid.*

9. The plaintiff, having brought suit against all the persons liable on a joint contract, part only them having been served with process and a return of *non est* as to the others, may declare against those upon whom process has been served and recover judgment against them only. By such judgment the plaintiff's cause of action against the other joint contractors will be merged and forever barred. *Reybold v. Parker*, 526.

PLEADING—*Continued.*

10. In an action of replevin the *locus in quo* is "material and traversable" and the venue must be alleged and proven. *Parvis v. Truax*, 574

See CORPORATIONS, 7; SALES, 10.

POSSESSION, ADVERSE—See REAL ESTATE, 3, 4; STATUTE OF LIMITATIONS, 2, 3.

POWER—See WILLS, 2.

PRACTICE—See EXECUTION, 1; PLEADING, 5, 8, 9.

PRESUMPTION—See STATUTE OF LIMITATIONS, 2.

PRIORITY OF LIENS—See APPLICATION OF PROCEEDS; EXECUTION; LIENS.

PROOF.

Weight of testimony does not necessarily lie with the side which produces the most witnesses to prove a fact, but rather with that where the facts sworn to are most consistent with the probability of truth. *Green v. Maloney*, 22.

See CONTRACTS, 5; CONDITIONAL SALES, 2; DAMAGES, 2.

PUBLIC OFFICERS—See CORPORATIONS, MUNICIPAL, 3.

QUO WARRANTO—See MANDAMUS.

REAL ESTATE.

1. When the owner of land commences to dig a cellar, or other excavation, along the division line between his land and that of a neighbor, he must take care to protect the soil of the latter from crumbling, or falling, by its own weight, into the cavity; otherwise he will be liable for the damage sustained. *Stimmel v. Brown*, 219.

2. It is a right incident to the ownership of land, that it shall be laterally supported by the adjacent land. If this support be removed, the owner thereof is entitled to damages in an amount sufficient to restore the property to as good a condition of lateral support as before the excavation. *Ibid.*

3. Possession of real estate, obtained under a contract of purchase, is by consent of the owner until all the conditions on the part of the purchaser are complied with. After performance of all conditions on the part of the purchaser, the possession becomes adverse, and if it so continue for twenty years, the right of the former owner to recover possession is gone. *Lynch v. Cannon*, 386.

4. In a case of mixed possession of land, no other title being shown by either party, the law adjudges it to belong to the party who first acquired actual and exclusive possession. *Coffin v. Lawson*, 327.

See SALES; TAXES, 2; WILLS.

RECORD, FOREIGN—See EVIDENCE, 4.

REFERENCE—See ARBITRATION and AWARD.

RE-HEARING—See INFANT.

REMEDY—See ARBITRATION and AWARD, 4; CONDITIONAL SALES, 1; CORPORATIONS, 7; MANDAMUS, 1, 2.

REPLEVIN.

1. In an action of replevin for goods sold and delivered, and the sale for proper cause afterwards being rescinded by the seller, the defendant is entitled to a verdict for the value of any goods taken, other than those received from the plaintiff in the rescinded sale. *England v. Forbes*, 301.

2. Where the taking was wrongful in the first instance, no previous demand is necessary for the maintenance of the action of replevin; but where the original taking was lawful but further detention of the property is unlawful, there must be a demand by the plaintiff upon the defendant and a refusal by him to comply therewith. No specific words need be used, but any language which is understood to be a demand on the part of the plaintiff and reply that was understood to be a refusal will be sufficient. *Truax v. Parvis*, 330.

3. In an action of replevin against a sheriff for levying upon goods which had been sold to the present owner upon conditional sale, no proof of a demand by the plaintiff and refusal by the sheriff to deliver the goods to him was necessary. *Forbes v. Martin*, 375.

See PLEADING, 6, 10.

SALES.

1. To make a sale of personal property valid there must be a valuable consideration paid, or secured to be paid, and an actual delivery into the hands of the purchaser as soon as conveniently may be after the sale is made. Where actual delivery is prevented on account of bulkiness, or other like cause, the property should be placed at once, or with all convenient promptness, within the exclusive power and control of the purchaser. *Miller v. Lacey*, 8.

2. Although all the requisites of a valid sale be present, yet, if the object of the sale be to delay or defeat creditors or hinder them in the use of the ordinary means for the collection of their debts, it will be void. *Ibid.*

3. To make such a sale invalid it must appear to the jury that the purchaser knew, either directly or circumstantially, that the object of the sale was to prejudice the rights of creditors. And a subsequent purchaser, without the knowledge of the intended fraud, could take no better title than the person from whom he purchased. *Ibid.*

4. In the case of a sale of a stock of goods in a store it is not necessary that all the different articles should be handed over to the buyer by actually placing them in his hands, but delivery may be made symbolically, as by giving him the key of the house or room in which they are stored; and then the control over them by the party selling must utterly cease, and thereafter remain exclusively in the purchaser. *Ibid.*

5. In a sale of personal property to be paid for after delivery by note with approved security, the property and title passes to the purchaser immediately upon the delivery of the goods, and the property cannot be repossessed by the seller should the purchaser fail to give the promised note. *England v. Forbes*, 301.

6. Where goods are sold to a person upon his false representation as to his solvency or ability to pay, the seller may rescind the contract of sale and retake the goods if they have been delivered to the buyer. *Ibid.*

7. After possession has been obtained by the purchaser under a fraudulent

SALES—*Coutinued.*

representation as to his solvency, an execution issuing at the suit of a *bona fide* judgment creditor, having no notice or knowledge of such representation, the lien of the levy thereby made will sold good against the defrauded seller. *Ibid.*

8. Mere insolvency of the buyer, well known to himself and concealed from the seller, does not, in itself, furnish sufficient ground for rescinding the contract of sale. *Ibid.*

9. The fraudulent purchasing and obtaining of goods with an intention of never paying for them, will not, of itself, render the sale absolutely void, but voidable only at the election of the seller. This election cannot be used against an innocent purchaser for value or a *bona fide* execution creditor having a levy thereon. *Ibid.*

10. The purchase price of articles, which by the contract of sale was to be paid for in goods, cannot be recovered in an action for the same unless the goods were demanded, and unless the contract was declared on specially. *Goldsmith v. Greenly*, 371.

11. A contract of sale generally implies that the price thereof is to be paid for in money. *Ibid.*

See APPLICATION OF PROCEEDS; CONDITIONAL SALES, 1, 2; CONTRACTS, 3; EXECUTION, 2; REAL ESTATE, 3; WILLS, 2.

SHELLY'S CASE—See WILLS, 1, 4.

SHERIFF—See APPLICATION OF PROCEEDS; EXECUTION.

STATUTES, CONSTRUCTION OF.

1. In the construction of statutes, unless words used in them have some technical meaning they shall be taken to have been used in their ordinary sense or meaning.

The word *family* in the "Act for the protection of women" has no technical meaning, and is there used in its ordinary sense or meaning. *Hogg v. Lobb's Ex'r*, 399.

2. Legislative Acts are to be read, understood and interpreted according to the plain meaning and ordinary import of the language employed in them. *Neary v. P. W. & B. R. R. Co.*, 419.

3. In the construction of statutes where any cause of doubt arises, although apparently the doubt attaches only to a particular clause, the whole statute is to be taken together to arrive at the legislative intent; and if possible such a construction is to be made as will avoid any contradiction or inconsistency; and it is the duty of the courts, as far as practicable, so to reconcile the different provisions as to make the whole Act consistent and harmonious. If this becomes impossible, then the court must give effect to what was manifestly the intention of the Legislature although by so doing it may restrict the meaning or application of general words. *Ibid.*

4. A rolling mill having a trussed roof is within the provision of the building ordinance of the City of Wilmington which provides "that the outside walls of buildings having trussed roois, such as churches, public halls, theatres, restau-

STASUTES, CONSTRUCTION OF—*Continued.*

ants and the like, if more than sixteen and less than twenty-five feet high, shall average at least seventeen inches in thickness." *Diamond State Iron Co. v. Giles*, 556.

See ACTION PENDING; ASSIGNMENT, 2; CORPORATIONS; CORPORATIONS, MUNICIPAL; EQUITY; MARRIED WOMEN, 1; MECHANICS' LIEN; ORPHANS' COURT; TAXES, 3; SALES, 1; STATUTE OF LIMITATIONS.

STATUTE OF LIMITATIONS.

1. Reasonable diligence in the case of a debtor absent from the State, requires a plaintiff, at least, to take some steps from time to time to ascertain whether his debtor can be reached with process. Where a debtor, or one of them, if there be more than one, resides in the State at the time the cause of action accrues, and afterwards removes therefrom, the plaintiff need not keep a suit pending against him. But where he, or one of them, if there be more than one, has afterwards come into the State in such manner that, by reasonable diligence, he may be served with process, the act commences to run again from the time of such return and never stops afterwards. *Dukes v. Collins*, 3.

2. The possession of one tenant in common is the possession of his co-tenants, and is presumed to be with their consent, and in support of their common title; and the statute of limitations will not run against the co-tenants, until there is an actual ouster, or such acts as are equivalent thereto. *Milbourn v. David*, 209.

3. Adverse, exclusive possession must be for twenty years to give a good title. *Coffin v. Lawson*, 327.

4. The act of limitations begins to run when the adverse possession commences, and does not stop thereafter, but continues at the will of the party in possession, unless interrupted by the act of one having a better title. *Lynch v. Cannon*, 386.

5. Where adverse possession begins during the lifetime of the real owner, it does not cease at his death by operation of law, but, if maintained, continues as against all parties claiming by or through him, whether minors, married women, persons of unsound minds or otherwise. *Ibid.*

6. Recognition of indebtedness by the deceased person within three years prior to bringing suit will take the claim out of the statute of limitations. *Hogg v. Lobb's Ex'r*, 399.

7. By the statute of limitations a lapse of three years after a minor comes of age is a complete bar to an action on a guardian bond for a distributive share of an estate, unless there be proof of a recognition or acknowledgement of indebtedness by the guardian within three years from the time of bringing suit. *Slaughter v. Slaughter*, 482.

8. In an action against several joint contractors, one of the defendants having been absent from the State at the time of the accruing of the cause of action, will prevent the Statute of Limitations from running in favor of the co-defendants, remaining within the State, until his return into the State in such manner that, by reasonable diligence, he may be served with process. *Reybold v. Parker*, 526.

See INFANT; PLEADING, 2; REAL ESTATE, 3.

STOCK—See EXECUTION, 2.

STOCKHOLDER OF CORPORATION—See CORPORATIONS, 2, 4, 7, 8.

STREETS, CARE OF—See CORPORATIONS, MUNICIPAL, 4.

SUBROGATION.

The lands of A were sold by the sheriff and the proceeds applied in part to the payment of a judgment against him in which he was surety for B;

The lands of B were afterwards sold and the proceeds applied to judgments in which he was surety for A;

The amount thus paid by B as surety for A was greater than the amount paid by A for B;

A is not entitled to subrogation in the judgment thus paid as surety for B without first paying the whole amount which B paid for him; and A's assignee can take no greater interest than he himself had. *Fulton, v. Harrington and Dunn*, 182.

SUIT—See ACTION PENDING; CONTRACTS, 7, 8; HUSBAND AND WIFE; PLEADING, 5.

SURETY—See GUARANTY; SUBROGATION.

TAXES.

1. The tax laid and collected by the Levy Court in each county for county purposes, is nevertheless a State tax, being levied by authority of the State. *Neary v. P. W. & B. R. R. Co.*, 419.

2. The roadbed of the P. W. & B. Railroad in this State is "real property" and as such subject to taxation for county purposes, unless specifically exempt therefrom by Act of Assembly. *Ibid.*

3. It is the meaning and intention of the Act of April 11, 1873 (Laws of Delaware, Vol. 14, page 339) that the sums stated therein, when paid by the Philadelphia, Wilmington & Baltimore Railroad Company to the State Treasurer, should be in lieu of all taxes which might thereafter become due from said company in each year under all laws of this State subjecting said company to taxation for the benefit of the State or any part of it; including taxation upon its roadbed or right of way in a county for county purposes under the general law of the State. *Ibid.*

TAVERNS—See INNKEEPER.

TENANTS IN COMMON—See CHANCERY; STATUTE OF LIMITATIONS, 2.

TITLE TO LAND.

The vendor in a written contract for the sale of land may bid at the Sheriff's sale of the vendee's equity therein without being thereby estopped from claiming title thereto. *Windsor v. Bacon*, 1.

See REAL ESTATE, 3, 4; STATUTE OF LIMITATIONS, 2, 3; WILLS.

TITLE TO PERSONAL PROPERTY—See CONDITIONAL SALES; SALES.

TRESPASS.

In a case of mixed possession of land one of the parties, plaintiff, may recover for the exportation and conversion to his own use by the other party, the defendant, of the fence placed thereon by the plaintiff. *Coffin v. Lawson*, 327.

TRUSTS.

No distinction now exists between express and constructive trusts. *Bradford v. Robinson*, 29.

TRUSTEE.

A trust estate cannot be supported where no active duty is to be performed by the trustee, and the whole management of the property is in the hands of the *cestui que trust.* *Jamison v. McWhorter*, 242.

See ASSIGNMENT, 1; DOWER.

USES—See TRUSTS; TRUSTEES.

VENDOR—See SALES.

VENUE—See PLEADING, 6.

VERDICT.

The jury must render their verdict according to the law and the evidence in the case. *Giles v. Diamond State Iron Co.*, 43.

WILLS.

1. The testator devised a certain farm to his executor in trust for certain uses, etc., and then directs as follows:

"To permit and suffer my son Clarence to use, occupy, and rent, and to receive the rents, issues, and profits of the said Capelle farm during the term of his natural life, for his proper use and benefit, and in case of the death of the said Clarence, leaving a child or children, or the issue of such, remainder to such child or children or the issue of such, their heirs and assigns, free and discharged from the aforesaid trust." "In case of the death of any of my said sons * * * without leaving child or children, or the issue of such, the share of the one so dying shall go to the survivor or survivors, or the issue of such, as may be deceased, subject to the same conditions, etc., as their own property."

The rule in Shelly's Case has no application. The limitation to the child or children of Clarence, who had none at the time, and to the issue of such of them as should be dead at the time of his death, leaving issue, is to the children as a class in remainder; and Clarence takes an estate for life and not an estate tail. *Jamison v. McWhorter*, 242.

2. The will of the testator containing no authority to mortgage the premises to raise money for the maintenance of the sons, the Court of Chancery has no power to authorize the same, and no title can be acquired by the sale by the sheriff in execution of the mortgage upon the said premises. *Ibid.*

3. The testator directed his real estate to be sold and the income of six hundred dollars to be paid annually to the plaintiff during her natural life and at her death the principal sum to be paid to her heir or heirs in equal proportions. *Held* that the plaintiff was entitled to the income only and not to the principal. *Gross v. Sheeler*, 280.

4. The rule in Shelley's Case has no applicability in the disposition of personal property. *Ibid.*

5. Words will be interpolated into a will in order to elucidate its meaning and to render clear that which otherwise might be considered doubtful or uncertain; and in order to carry out the apparent intent of the testator the will will be construed as if said words had been inadvertently omitted. *Cooper v. Cooper*, 488.

6. The testator by his will created and established cross remainders among his several children respectively and their children lawfully begotten; so that his children and their children should inherit so long as any of them should survive

WILLS—*Continued.*

with remainder over to strangers in fee upon the issue of his own body becoming extinct. Held that a son of one of the children of the testator, his father being dead, is entitled to an estate in possession of a proportional share of the lands devised to one of the testator's sons who had since died intestate without issue. *Ibid.*

7. One of the sons of the testator having died intestate and without issue, the sole surviving son of the testator is not entitled to the whole of his estate in remainder but the children of the other children of the testator are entitled to the same share of said estate as their parents would have received had they been living, as per stirpes. *Ibid.*

WILMINGTON—See CORPORATIONS, MUNICIPAL, 2.

WITNESS.

The wife of an executor cannot testify in a suit wherein he is a party. *Bradley v. Kent Ex'r*, 372.

See EVIDENCE; PROOF.

WORDS AND PHRASES—See STATUTES, CONSTRUCTION OF.